

JUDGMENT OF THE GENERAL COURT (Second Chamber)

3 March 2011 *

In Case T-110/07,

Siemens AG, established in Berlin (Germany) and in Munich (Germany), represented initially by I. Brinker, T. Loest and C. Steinle, and subsequently by I. Brinker and C. Steinle, lawyers,

applicant,

v

European Commission, represented initially by F. Arbault and O. Weber, and subsequently by X. Lewis and R. Sauer, and lastly by M. Sauer and A. Antoniadis, acting as Agents,

defendant,

* Language of the case: German.

APPLICATION, in the first place, for the partial annulment of Commission Decision C(2006) 6762 final of 24 January 2007 relating to a proceeding under Article 81 EC and Article 53 of the EEA Agreement (Case COMP/F/38.899 — Gas insulated switch-gear) and, in the alternative, for a reduction in the amount of fine imposed on the applicant,

THE GENERAL COURT (Second Chamber),

composed of I. Pelikánová (Rapporteur), President, K. Jürimäe and S. Soldevila Fragoso, Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 16 December 2009,

gives the following

Judgment

Background to the dispute

- ¹ The applicant, Siemens AG, is a publicly traded company active in electrical engineering and electronics. It has its seat in Berlin (Germany) and in Munich (Germany).

- 2 Gas insulated switchgear ('GIS') is used to control energy flow in electricity grids. It is heavy electrical equipment, used as a major component for turnkey power sub-stations. Substations are auxiliary power stations where electrical current is converted. In addition to the transformer, other essential components for substations are control systems, relays, batteries, chargers and switchgear. The function of switchgear is to protect the transformer from overload and/or insulate the circuit and a faulty transformer.
- 3 Insulation of switchgear may be through gas, air or some combination of the two ('hybrid switchgear'). GIS is sold across the world both as forming part of turnkey power substations or as loose equipment which has to be integrated into a turnkey power substation. It accounts for 30 to 60% of the total price of a substation.
- 4 On 3 March 2004, ABB Ltd ('ABB') informed the Commission of anti-competitive practices in the GIS sector and submitted an oral application for immunity from fines pursuant to the Commission Notice of 19 February 2002 on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3, 'the Leniency Notice').
- 5 The practices reported by ABB entailed coordination on a worldwide scale for the award of GIS projects, involving market sharing, allocation of market quotas and maintenance of respective market shares, the allocation of GIS projects to designated producers and manipulation of the bidding procedure for those projects (bid-rigging) in order to ensure that the assigned producers were awarded the contract in question, the fixing of prices by means of complex price arrangements for GIS projects which

were not allocated, the termination of licence agreements with non-cartel members and the exchange of sensitive market information.

- 6 The oral application for immunity made by ABB was supplemented with oral statements and documentary evidence. On 25 April 2004, the Commission granted conditional immunity to ABB.
- 7 On the basis of ABB's statements, the Commission launched an investigation and, on 11 and 12 May 2004, it carried out inspections at the premises of Areva T&D SA, Siemens AG, the VA Tech Group, Hitachi Ltd and Japan AE Power Systems Corp ('JAEPS').
- 8 On 20 April 2006, the Commission adopted a statement of objections which was addressed to 20 companies, including Siemens.
- 9 The Commission held hearings on 18 and 19 July 2006.
- 10 On 24 January 2007, the Commission adopted decision C (2006) 6762 final relating to a proceeding under Article 81 EC and Article 53 of the EEA Agreement (Case COMP/F/38.899 — Gas insulated switchgear) ('the contested decision'). Siemens was notified of that decision on 8 February 2007.
- 11 In addition to Siemens, the contested decision was addressed to ABB, Alstom, SA, Areva, SA, Areva T&D AG, Areva T&D Holding SA and Areva T&D SA, Fuji Electric Holdings Co., Ltd and Fuji Electric Systems Co., Ltd (together 'Fuji'), Hitachi Ltd

and Hitachi Europe Ltd (together ‘Hitachi’), JAEPS, Mitsubishi Electric System Corp. (‘Melco’) and Nuova Magrini Galileo SpA, Schneider Electric SA, Siemens AG Österreich, Siemens Transmission & Distribution Ltd (‘Reyrolle’), Siemens Transmission and Distribution SA, Toshiba Corp. and VA Tech Transmission & Distribution GmbH & Co. KEG.

- 12 In recitals 113 to 123 of the contested decision, the Commission stated that the various undertakings which participated in the cartel had coordinated the allocation of GIS projects worldwide — except for specific markets — according to agreed rules in order to maintain quotas largely reflecting estimated historic market shares. It pointed out that the allocation of GIS projects had been carried out on the basis of a joint ‘Japanese’ quota and a joint ‘European’ quota, which the Japanese and European producers then had to distribute among themselves. An agreement signed in Vienna on 15 April 1988 (‘the GQ Agreement’) established rules allowing the allocation of GIS projects to either Japanese producers or European producers and to set their value against the corresponding quota.
- 13 In addition, in recitals 124 to 132 of the contested decision, the Commission stated that the various undertakings which participated in the cartel had entered into an unwritten agreement (‘the common understanding’), under which GIS projects in Japan, on the one hand, and in the countries of European members of the cartel, on the other — together described as the ‘home countries’ for GIS projects — were reserved to Japanese members and European members of the cartel respectively. GIS projects located in the ‘home countries’ were not the subject of information exchanges between the two groups and were not charged to their respective quotas. The GQ Agreement also contained rules relating to the exchange of information necessary for operation of the cartel between the two groups of producers, carried out in particular by their respective secretaries, and to the manipulation of the bidding procedures concerned and the fixing of prices for GIS projects which could not be allocated. Under the terms of Annex 2 to the GQ Agreement, it applied across the world, except in the

United States, Canada, Japan and 17 western-European countries. Furthermore, under the common understanding, GIS projects in European countries, other than the 'home countries', were also reserved for the European group, as the Japanese producers had undertaken not to submit bids for GIS projects in Europe.

- ¹⁴ According to the Commission, the sharing of GIS projects among European producers was governed by an agreement also signed in Vienna on 15 April 1988, entitled 'E-Group Operation Agreement for GQ Agreement' ('the EQ Agreement'). It indicated that the distribution of GIS projects in Europe followed the same rules and procedures as those governing the distribution of GIS projects in other countries. In particular, GIS projects in Europe also had to be notified, recorded, allocated, arranged or have received a minimum price.
- ¹⁵ In recital 142 of the contested decision, the Commission stated that, in the GQ Agreement and in the EQ Agreement, and for the purpose of the organisation and good functioning of the cartel, different members of the cartels were identified by a code, consisting of numbers for the European members and letters for the Japanese members. The initial codes were replaced by numbers from July 2002.
- ¹⁶ In Article 1(o) of the contested decision, the Commission found that Siemens had participated in the infringement for the periods from 15 April 1988 to 1 September 1999 and from 26 March 2002 to 11 May 2004.

- 17 In respect of the infringements referred to in Article 1 of the contested decision, a fine in the amount of EUR 396 562 500 was imposed on Siemens, in Article 2(m) of the contested decision.

Procedure and forms of order sought

- 18 By application lodged at the Registry of the General Court on 16 April 2007, Siemens brought the present application.
- 19 Upon hearing the Report of the Judge-Rapporteur, the General Court (Second Chamber) decided to open the oral procedure
- 20 In the context of measures of organisation of procedure, laid down in Article 64 of the Rules of Procedure of the General Court, the parties were invited to reply to the written questions of the Court. The parties replied within the prescribed time-limits.
- 21 At the hearing on 16 December 2009, the parties presented oral argument and their answers to the questions put by the Court.
- 22 Siemens claims that the Court should:

— annul the contested decision inasmuch as it relates to the applicant;

- in the alternative, reduce the amount of the fine imposed on the applicant;

- order the Commission to pay the costs

²³ The Commission contends that the Court should:

- dismiss the application;

- order Siemens to pay the costs.

Law

²⁴ In support of its application for annulment, Siemens raises three pleas in law. The first alleges infringement of Article 81(1) EC and Article 53 of the Agreement on the European Economic Area ('the EEA Agreement'). The second plea alleges infringement of Article 25 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1). The third plea alleges errors of law in the calculation of the amount of the fine.

I — The first plea, alleging infringement of Article 81(1) EC and Article 53(1) of the EEA Agreement

- ²⁵ The first plea is divided into two parts. In the context of the first part, Siemens claims an ‘inadequate description of the alleged infringements’. In the context of the second part, it claims ‘incorrect analysis of the alleged agreements and their effects on the common market’.

A — The first part of the first plea, alleging ‘inadequate description of the alleged infringements’

1. Arguments of the parties

- ²⁶ Siemens claims that the Commission has not accurately described and adequately proved the infringement for which it is criticised. It claims, in essence, that, first, the Commission did not prove the single and continuous nature of the conduct which is criticised, second, that the Commission neglected to describe the actual effects of the cartel on the common market and, third, that the Commission did not adduce evidence of Siemens overall intention to participate, on two occasions, in the same infringement.
- ²⁷ The Commission contends that that plea should be rejected as not adequately substantiated. It contends, in addition, that Siemens’ assertions are unfounded.

2. Findings of the Court

²⁸ It must be stated that the first part of the first plea contains only grounds of complaint which are either also raised in other parts of the application, or must also be examined when assessing other pleas raised by Siemens that also concern Article 1 of the contested decision, finding the alleged infringement. Thus, the ground of complaint alleging a lack of evidence of the single and continuous nature of the criticised conduct is also raised in the context of the second part of the second plea, and the ground of complaint based on Siemens' overall intention to participate in the infringement must also be addressed in that context. Likewise, the ground of complaint based on the failure to describe the actual effects of the cartel on the common market is also contained, in a much more detailed fashion, in the context of the second part of the first plea. It is therefore evident that the first part of the first plea is not an autonomous ground of complaint.

²⁹ Therefore, it is not necessary to rule on the first part of the first plea.

B — The second part of the first plea, alleging 'incorrect analysis of the alleged agreements and their effects on the common market'

³⁰ In the context of the second part of the first plea, Siemens raises three grounds of complaint alleging, respectively, that there was no cartel which had effects within the EEA, that there was no geographical sharing of the markets between Japanese producers and European producers, and that there was no protection of 'home countries'.

- ³¹ Those three grounds of complaint are closely linked. First, the second and third grounds of complaint concern findings of the Commission which, if proved, show the existence of a cartel having effects within the EEA, an issue which is the subject-matter of the first ground of complaint. Second, the three grounds of complaint are also connected to the extent that they concern the same evidence relied on by the Commission. Therefore, they should be examined together.

1. Arguments of the parties

- ³² Siemens claims that, in relation to the first phase of its participation, corresponding to the period from 1988 to 1999, the infringement which it is alleged to have committed is not sufficiently substantiated in the contested decision. In particular, the Commission wrongly considered that the GQ Agreement and the EQ Agreement prove an infringement which entailed effects within the EEA, although the EEA was explicitly excluded from the scope of those agreements. Such an infringement has also not been proved by the other evidence put forward by the Commission.
- ³³ Siemens takes the view, in that regard, that the Commission has not proved that the European and Japanese producers had decided, in the common understanding, not to intervene in the markets of their respective countries. Such a geographical division of markets is proved neither by the explicit exclusion of the 17 European countries from the scope of the GQ Agreement, nor by the alleged allocation of GIS projects in Europe to the global quota, nor even by the statements of Hitachi or Fuji upon which the Commission relies. By contrast, the fact that the participants in the GQ Agreement refrained from marketing their products on certain European markets was a result, exclusively, of technical and economic barriers to access to those markets.

³⁴ Siemens disputes both the existence of a geographical division of the European markets under the principle of ‘home countries’ or ‘home markets’ and its participation in the alleged ‘prior arrangements in Europe’, relied on by the Commission to substantiate its view that markets in the EEA were shared. The evidence adduced by the Commission in that regard is inadequate. Lastly, the fact that some producers were not active on certain national markets can be explained other than by way of the existence of an unlawful cartel.

³⁵ The Commission disputes the arguments put forward by Siemens.

2. Findings of the Court

³⁶ It must be pointed out, at the outset, that in its written pleadings, Siemens explicitly accepts the facts, as set out in the contested decision, relating to the second phase of its participation in the infringement, corresponding to the period from 2002 to 2004. The first plea raised by Siemens thus concerns solely the first phase of its participation in the infringement, corresponding to the period from 1988 to 1999. Accordingly, the evidence relied on by the Commission needs to be examined, in the context of the first part of the first plea only, to the extent that it allows conclusions to be drawn in relation to that first period.

³⁷ In that regard, the Court must reject the Commission’s argument that it is legitimate to project the observations relating to the period from 2002 to 2004 on to the earlier period, since they relate to one and the same infringement. It being unnecessary, at this stage, to rule on the existence of a single infringement covering the two periods of

Siemens' participation in the cartel, the Court must first assess on a case-by-case basis the extent to which the evidence concerning one particular period of the infringement is capable of providing indicia that are also valid in relation to the first phase of its participation in the infringement.

³⁸ In addition, the Commission's contention that Siemens disputes only the cartel's impact on competition in the EEA, whereas, in the contested decision, it criticised Siemens for concluding an agreement with the aim of distorting competition within the common market, cannot result in a limitation of the examination of the facts disputed by Siemens. It is apparent from all of Siemens' arguments in its written pleadings that it disputes not only the allegation that the cartel complained of had effects within the common market and the EEA (excluding Liechtenstein and Iceland), but also the fact that the aim of that cartel was to distort competition within the common market and the EEA.

³⁹ The parties therefore disagree, in essence, on the issue whether the Commission established, for the period between 1988 and 1999, the existence of a cartel which could have had effects within the common market and the EEA.

⁴⁰ It is thus necessary to determine whether the GQ Agreement and the EQ Agreement, as documentary evidence, prove the existence of a cartel which could have had effects within the common market and the EEA. In that regard, it is not necessary to distinguish between the two alternatives in Article 81(1) EC. According to settled case-law, in deciding whether a concerted practice is prohibited by Article 81(1) EC, there is no need to take account of its actual effects once it is apparent that its object is to prevent, restrict or distort competition within the common market (see Case C-8/08

T-Mobile Netherlands and Others [2009] ECR I-4529, paragraph 29, and the case-law cited). That case-law is applicable, by analogy, to Article 53(1) of the EEA Agreement.

- 41 In the event of a reply in the negative, it will then be necessary to determine whether the common understanding relied on by the Commission is sufficiently substantiated by a body of other evidence.
- 42 However, before making those determinations, the rules relating to the burden of proof should be recalled, since the parties also disagree in relation to them.

(a) The burden of proof

- 43 It should be borne in mind, first, that the Commission must prove the infringements of Article 81(1) EC found by it and adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement (Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8417, paragraph 58, and Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 86).
- 44 In that context, any doubt in the mind of the Court must operate to the advantage of the undertaking to which the decision finding an infringement was addressed. The Court cannot therefore conclude that the Commission has established the infringement at issue to the requisite legal standard if it still entertains any doubts on that point, in particular in proceedings for annulment of a decision imposing a fine

(Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP *Dresdner Bank and Others v Commission* [2006] ECR II-3567, paragraph 60).

⁴⁵ In that latter situation, it is necessary to take account of the presumption of innocence, as it results in particular from Article 6(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), which is one of the fundamental rights which, according to the settled case-law of the Court of Justice, also reaffirmed in Article 6(2) EU, constitute general principles of Community law. Given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies, *inter alia*, to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (see, to that effect, Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, paragraphs 149 and 150, and Case C-235/92 P *Montecatini v Commission* [1999] ECR I-4539, paragraphs 175 and 176).

⁴⁶ Thus, the Commission must show precise and consistent evidence in order to establish the existence of the infringement (*Dresdner Bank and Others v Commission*, paragraph 44 above, paragraph 62) and to support the firm conviction that the alleged infringements constitute appreciable restrictions of competition within the meaning of Article 81(1) EC (Joined Cases T-185/96, T-189/96 and T-190/96 *Riviera Auto Service and Others v Commission* [1999] ECR II-93, paragraph 47).

⁴⁷ However, it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the set of indicia relied on by the institution, viewed as a whole, meets that requirement (see *Dresdner Bank and Others v Commission*, paragraph 44 above, paragraph 63, and the case-law cited).

48 Moreover, as anti-competitive agreements are known to be prohibited, and are known as a result to be implemented clandestinely, the Commission cannot be required to produce documents expressly attesting to contacts between the traders concerned. The fragmentary and sporadic items of evidence which may be available to the Commission should, in any event, be capable of being supplemented by inferences which allow the relevant circumstances to be reconstituted. The existence of an anti-competitive practice or agreement may therefore be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (*Dresdner Bank and Others v Commission*, paragraph 44 above, paragraphs 64 and 65, and Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123, paragraphs 55 to 57).

49 However, where the Commission relies solely on the conduct of the undertakings in question on the market in finding that an infringement has been committed it suffices for those undertakings to show the existence of circumstances which cast the facts established by the Commission in a different light and thus allow another, plausible explanation of those facts to be substituted for the one adopted by the Commission in concluding that the Community competition rules had been infringed (see, to that effect, Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others v Commission* [2004] ECR II-2501, paragraph 186, and the case-law cited).

50 As regards the type of evidence which can be relied on to establish an infringement of Article 81 EC and Article 53 of the EEA Agreement, it should be observed that the prevailing principle of Community law is the unfettered evaluation of evidence (Case T-50/00 *Dalmine v Commission* [2004] ECR II-2395, paragraph 72). In particular, no provision or any general principle of Community law prohibits the Commission from relying, as against an undertaking, on statements made by other incriminated undertakings. If that were not the case, the burden of proving conduct contrary to Article 81 EC and Article 82 EC, which is borne by the Commission, would be

unsustainable and incompatible with the task of supervising the proper application of those provisions which is entrusted to it by the EC Treaty (*JFE Engineering and Others v Commission*, paragraph 49 above, paragraph 192).

51 Therefore, the existence of an alternative explanation for the facts is relevant only where the Commission relies solely on the conduct of the undertakings on the relevant market. Thus, such an explanation is irrelevant from the moment when the existence of the infringement is not merely presumed, but is established by proof. In addition, pursuant to the principle of the unfettered evaluation of evidence, referred to in the previous paragraph, all types of evidence are admissible for proving an infringement, with the result that the existence of an alternative explanation is irrelevant where an infringement is proved to the requisite legal standard by evidence other than documentary evidence (see, to that effect, Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others v Commission* [1999] ECR II-931, paragraphs 727 and 728).

52 In the present case, it is therefore necessary, in relation to the evidence disputed by Siemens, to ascertain whether the conduct for which it is criticised by the Commission in the contested decision is established by evidence or whether it has been inferred solely from the conduct of the undertakings in question on the market. Only if the latter is the case will it then be necessary to examine whether there are alternative explanations for the conduct of the undertakings in question on the market, which are sufficiently plausible to undermine the findings made in the contested decision.

53 However, according to the case-law, as anti-competitive agreements are known to be prohibited, and are known to be implemented clandestinely, the proof of the existence

of a cartel may be inferred from a set of consistent indicia (see paragraph 48 above). Therefore, Siemens cannot claim that such evidence should be excluded by relying on the fact that, taken in isolation, the individual pieces of evidence adduced by the Commission are not sufficient to prove the conduct for which it is criticised. By definition, the individual pieces of evidence which are part of that consistent set of indicia put forward by the Commission cannot, when taken in isolation, constitute complete proof of that conduct.

⁵⁴ As regards the probative value which should be attached to the various pieces of evidence, it must be noted that the sole criterion relevant for evaluating freely adduced evidence is the reliability of that evidence (see Case T-44/00 *Mannesmannröhren-Werke v Commission* [2004] ECR II-2223, paragraph 84, and the case-law cited; *Dalmine v Commission*, paragraph 50 above, paragraph 72, and *JFE Engineering and Others v Commission*, paragraph 49 above, paragraph 273). According to the generally applicable rules on evidence, the reliability and, therefore, the probative value of a document depends on its origin, the circumstances in which it was drawn up, the person to whom it is addressed and the reputed and reliable nature of its content (Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others v Commission* [2000] ECR II-491, paragraph 1053; Opinion of Judge Vesterdorf, acting as Advocate General, in Case T-1/89 *Rhône-Poulenc v Commission* [1991] ECR II-867, II-869, at II-956). In particular, great importance must be attached to the fact that a document has been drawn up in close connection with the events (Case T-157/94 *Ensidesa v Commission* [1999] ECR II-707, paragraph 312, and Joined Cases T-5/00 and T-6/00 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie v Commission* [2003] ECR II-5761, paragraph 181) or by a direct witness of those events (*JFE Engineering and Others v Commission*, paragraph 49 above, paragraph 207). Furthermore, statements which run counter to the interests of the declarant must in principle be regarded as particularly reliable evidence (*JFE Engineering and Others v Commission*, paragraph 49 above, paragraphs 207, 211 and 212).

(b) The probative value of the GQ Agreement and the EQ Agreement

55 As regards, first, the GQ Agreement, the parties agree on the fact that that agreement provides for the implementation of a cartel in GIS projects worldwide, including, *inter alia*, for the exchange of information on bids and on contracts concluded, with the help of standardised forms, the allocation of a quota for the groups of European manufacturers and Japanese manufacturers respectively, the allocation of markets within the cartel, bid-rigging, the fixing of minimum prices and action against those undertakings outside the cartel. However, it must be pointed out that, as Siemens asserts, the wording of the GQ Agreement excludes its application in Europe. Annex 2 to that agreement, relating to its geographical scope, defines five groups of territories. The first group is described as covering Europe and the Mediterranean excluding the 12 Member States of the Community at that time, as well as Austria, Sweden, Switzerland, Finland and Norway. As regards the EEA, therefore, only Liechtenstein and Iceland come within the scope of that agreement; a fact which is relevant only after the entry into force of the EEA Agreement on 1 January 1994. The second group is described as covering Asia excluding Japan.

56 The wording of the GQ Agreement is not therefore, in and of itself, evidence of a cartel which had effects within the common market and the EEA.

57 As regards, next, the EQ Agreement, it must be noted that it constitutes merely an agreement implementing the GQ Agreement, a fact which is confirmed by its title and the provisions contained in its preamble, according to which, in particular, the EQ Agreement applies in the context of the implementation of the GQ Agreement and the rules of the GQ Agreement take precedence over those of the EQ Agreement. In essence, the EQ Agreement contains rules concerning the redistribution of the joint 'European' quota between the European producers. That redistribution was

carried out according to the procedure laid down in Article 4 of the EQ Agreement and in accordance with the quotas set out in Article 8 of that agreement.

- ⁵⁸ Since the EQ Agreement thus, in principle, only apportions the joint ‘European’ quota provided for in the GQ Agreement, which excludes, as has been explained, the common market and the majority of the EEA, the wording of the EQ Agreement does not constitute proof of a cartel which had effects within the common market and the EEA. Therefore, as has already been explained in paragraph 39 above, it must be assessed whether the Commission has succeeded in proving the existence of such effects in another way. As regards the conclusions which it is possible to draw, beyond their wording, from the GQ Agreement and the EQ Agreement, they will be considered in paragraphs 140 et seq. below, relating to documentary evidence.

(c) Proof of the common understanding

- ⁵⁹ It must be noted, at the outset, that the fact that the clauses of the GQ Agreement, to which the EQ Agreement also refer, explicitly exclude the European and Japanese markets from their scope cannot be considered automatically as proof that the cartel did not have effects on the European markets, nor as proof that there was no geographical sharing or that there were no ‘home countries.’ While that exclusion may mean that the implicated undertakings pursued undistorted competition on those markets, it may also mean that the allocation and supervision of quotas between the European and Japanese groups was not necessary in respect of those markets, since those markets were, in any event, reserved exclusively to one of the two groups, which is the Commission’s interpretation.

⁶⁰ It must be pointed out that an understanding which seeks to respect the traditional privileged positions of parties to the cartel on the European and Japanese markets respectively, if established, would constitute, in itself, a cartel having effects on the common market, inasmuch as it suppresses the potential competition which Japanese producers would have provided in the common market. That would be the case even in the event that the Commission did not succeed in showing that the European producers had, in addition, shared the European market among themselves. However, as is explained below, the Commission has proved, to the requisite legal standard, those facts disputed by Siemens in the context of the first plea.

⁶¹ In order to prove the existence and the scope of the common understanding, the Commission referred, in the contested decision, to a number of pieces of evidence, including the statements of ABB, Mr M., Fuji and Hitachi, the fact that neither Alstom, nor the companies comprising the Areva group, or the group of which VA Technology was the parent company ('the VA Tech Group') openly disputed the common understanding, a list of GIS projects which were discussed within the cartel provided by ABB, and some documentary evidence. It is therefore necessary to examine the full significance and the probative value of each of those pieces of evidence.

The statements of ABB and Mr M.

⁶² In its statements, ABB indicated that the western-European and Japanese territories were protected and that certain cases, in which the Japanese producers had envisaged, contrary to that arrangement, responding to European tenders, had caused problems within the cartel but had eventually been resolved. In addition, in its statement of 3 February 2005, ABB stated that the results of the allocation of GIS projects in the common market — excluding the 'home countries' — were then attributed to the world

quotas of the European producers in the cartel. Lastly, in its statement of 4 October 2005, ABB admitted the existence of a system of 'home countries', according to which, if there was only one producer in those countries, it was the sole owner of the projects and, if there were a number of producers, they shared the projects among themselves.

⁶³ Siemens claims, in that regard, that ABB's statements are mere assertions made for the benefit of that company and are devoid of probative value unless they are supported by precise and corroborated evidence. The Commission takes the view, for its part, that a statement from an undertaking seeking to obtain immunity has a particular probative value on account of the simple fact that it runs counter to the normal interests of the author of that statement.

⁶⁴ As regards the level of credibility to attribute to ABB's statements, it must be observed that, in the present case, as the first whistleblower on the cartel, ABB could reasonably have expected to benefit from the absolute immunity from fines provided for in point 8 of the Leniency Notice. Therefore, it cannot be ruled out that it might have felt inclined to maximise the significance of the infringing conduct which it was revealing, in order to harm its competitors on the market.

⁶⁵ That does not however mean that ABB's statements are to be regarded as devoid of all credibility. In that regard, it has been held that the fact of seeking to benefit from the application of the Leniency Notice in order to obtain a reduction in the fine does not necessarily create an incentive to submit distorted evidence. Indeed, any attempt to mislead the Commission could call into question the sincerity and the completeness of cooperation of the person seeking to benefit, and thereby jeopardise his chances

of benefiting fully under the Leniency Notice (Case T-120/04 *Peróxidos Orgánicos v Commission* [2006] ECR II-4441, paragraph 70).

- ⁶⁶ None the less, in so far as those statements from ABB are disputed by other undertakings which are also alleged to have agreed upon the common understanding, they must be supported by other evidence in order to constitute adequate proof of the existence and the scope of the common understanding (see, to that effect, Case T-337/94 *Enso-Gutzeit v Commission* [1998] ECR II-1571, paragraph 91, and Case T-38/02 *Groupe Danone v Commission* [2005] ECR II-4407, paragraph 285).
- ⁶⁷ It must therefore be ascertained to what extent ABB's statements relating to the sharing of the market between European and Japanese producers, and the existence of 'home countries', are supported by the other evidence relied on by the Commission.
- ⁶⁸ In that respect, it must be noted that the Commission refers in the contested decision, inter alia, to the statements of Mr M., a former employee of ABB who had represented that undertaking at the operational level of the cartel from 1988 to April 2002.
- ⁶⁹ As regards the nature of the statements of Mr M., it must be stated, as a preliminary remark, that his testimony cannot be classified as different than or independent from that of ABB. Not only was he employed by that company during his entire professional life — a fact which cannot guarantee that they do not have differing interests, as the Commission rightly points out — but also spoke to the Commission as a representative of ABB in the context of the obligation on the latter to cooperate for the purposes of obtaining immunity from fines, in accordance with point 11 of the Leniency

Notice, and was assisted by ABB's lawyer, as is clear from the introduction to the transcript of what was said during his hearing on 23 September 2005. In addition, the Commission assimilated Mr M.'s testimony with ABB's statements, for example in footnotes 90 and 91 of the contested decision.

70 It follows that Mr M.'s statements cannot be considered to constitute other evidence supporting ABB's statements, within the meaning of the case-law cited in paragraph 66 above, but must be regarded as forming part of ABB's evidence. That does not deprive them of all probative value. They may, in particular, serve to make ABB's statements more precise. However, it is necessary to corroborate the information gleaned from Mr M.'s testimony with other evidence in order to have sufficient evidence of the existence and the scope of the common understanding, in the same way as the information gleaned from ABB's statements, despite the fact that Mr M. cannot have, in contrast to ABB, a personal interest in maximising the infringing conduct of ABB's competitors. The same considerations apply, as well, to the statements of Mr V.-A., an employee of ABB, who was interviewed by the Commission under the same conditions as those described in the previous paragraph for Mr M.

71 As regards the content of the statements of Mr M., it should be noted that he indicated that the principle of protecting home markets was of the utmost importance for the conclusion of the cartel and that the cartel could not have functioned without compliance with that principle.

72 According to Mr M., that is the reason why, during the determination of the quotas for the various undertakings implicated at the time when the cartel was created in 1988, the respective home markets of the European and Japanese producers — that is to say, on the one hand, Japan as the home market for the Japanese undertakings and, on the other, Germany, France, Sweden, Switzerland and Italy as the home markets

for the European undertakings — were excluded from the assessment of the market share held by each undertaking.

⁷³ Mr M. also stated that European countries other than the ‘home countries’ were excluded from the system of project sharing provided for in the GQ Agreement, in order not to affect the functioning of certain collusive practices which had developed at a local level between different producers throughout the years. By contrast, the volume of contracts obtained by each producer was taken into account for the purposes of supervising compliance with the global quotas of the European and Japanese groups and the quotas of each undertaking.

⁷⁴ Mr M., in addition, considered that there were no insurmountable technical or commercial barriers to entry on to the European market for the Japanese undertakings and that such entry would have been possible, in the medium term, by way of certain investments. Therefore, in his opinion, the Japanese undertakings refrained from entering the European market in order to comply with the rules of the cartel rather than for technical reasons.

⁷⁵ As regards the credibility of Mr M.’s testimony, account must be taken of the fact that, for almost the entire duration of the cartel, namely from 1988 to 2002, he was one of ABB’s representatives in the context of that cartel, while ABB itself was one of the main players in the cartel. He was therefore a direct witness of the circumstances which he set out. Therefore, his testimony must, in principle, be classified as evidence with a high probative value.

- ⁷⁶ In addition, Mr M's statements are coherent and clear, albeit that he does not recall all the factual details of the implementation of the cartel in which he participated, on behalf of ABB, for 14 years. In a testimony covering such a long period, the fact that there may be some slight inaccuracies in those statements must be considered to be normal.
- ⁷⁷ Therefore, a high level of credibility must be attached to Mr M's statements, notwithstanding the fact, referred to above, that they must be assessed as statements made on behalf of ABB.
- ⁷⁸ Doubt is not cast on that assessment by the arguments put forward by Siemens to dispute the credibility of Mr M's testimony and, in particular, by the alleged inconsistencies between that testimony and the testimony of Mr V.-A. The claims from Siemens that, first, Mr V.-A. stated that the Member States of the EEA, like the countries of North America, were excluded from the scope of the GQ Agreement and, second, that the Commission had not shown in what way Mr V.-A.'s testimony was less reliable than that of Mr M., cannot succeed since Mr V.-A.'s testimony does not contradict that of Mr M.
- ⁷⁹ In that regard, it must be stated that Mr V.-A. himself confirmed, in his statement of 21 September 2005, that he participated in only six to ten operational meetings between 1997 and 1998, had limited knowledge and was dependent, in that respect, on Mr M., who was the only person to have certain information, in particular concerning the exclusion of North America and Europe from the scope of the GQ Agreement.

- 80 Moreover, Mr V.-A. noted a difference between the exclusion of North America and that of Europe, stating that the United States was excluded for fear of exposure to the severe penalties which threaten cartel participants in that country, whereas he assumed that the European projects were actually handled by the undertakings participating in the cartel, but not in the course of the meetings in which he himself participated.
- 81 Lastly, Mr V.-A. indicated that he had witnessed, during the meetings in which he had participated, disputes between the representatives of the group of Japanese producers and those of the group of European producers in relation to alleged attempts by Japanese producers to penetrate European markets, infringing an agreement which prohibited them from competing against European producers in Western Europe. He also stated that he saw no insurmountable technical or commercial barrier to Japanese producers entering the European markets.
- 82 On the basis of the limited knowledge which he, in his own words, had of how the cartel functioned, Mr V.-A.'s statements are therefore consistent with those of Mr M. and even corroborate them in certain respects, in particular in relation to the sharing of markets between European and Japanese producers. Even if the Commission did not explicitly state it in the contested decision, Mr V.-A.'s testimony thus constitutes evidence against Siemens rather than evidence in its favour. Therefore, Siemens' argument alleging that the testimonies of Mr M. and Mr V.-A. are contradictory must be rejected.
- 83 In conclusion, Mr M.'s statements, which have a high degree of credibility, constitute evidence of the existence of the principle of protecting 'home countries', of reserving European markets outside 'home countries' for the benefit of European producers and of taking account of their volume of sales for the purposes of compliance with the global quotas. However, as has been stated in paragraph 70 above, Mr M.'s statements

must be substantiated by other evidence, in the same way as those of ABB, in order to be able to constitute sufficient evidence of the existence and scope of the common understanding.

Fuji's statements

⁸⁴ Fuji stated that it was aware of the common arrangement under which the Japanese producers had to refrain from entering the European market. However, it claims that its own decision to refrain was mainly due to the fact that it could not realistically expect to provide GIS in Europe for other reasons, in particular because of its limited share of the world market did not justify incurring the sunk costs necessary to develop a European base. As regards the sole GIS project which Fuji had carried out in Europe, namely a project in the Czech Republic in 1995, it claims that it acted, in that instance, as a sub-contractor for another Japanese company to which it provided the GIS in question in Japan. Therefore, it considers that project to be like a GIS project in Japan and takes the view that it does not show its general capacity to supply in Europe.

⁸⁵ Siemens claims, in that regard, that that statement from Fuji was submitted only after the hearing referred to in paragraph 9 above, that is to say at a time when Fuji was no longer in a position to provide impartial and objective testimony. According to the case-law, only documents cited or mentioned in the statement of objections constitute valid evidence (see Case C-62/86 *AKZO v Commission* [1991] ECR I-3359, paragraph 21, and *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie v Commission*, paragraph 54 above, paragraph 34, and the case-law cited).

⁸⁶ That objection cannot succeed. The statement of objections must allow those concerned to have effective knowledge of the conduct in respect of which they are accused by the Commission. That requirement is met when the final decision does not find that the undertakings concerned have committed infringements different from those referred to in the statement of objections and upholds only facts on which the persons concerned have had the opportunity to give an explanation (Case 41/69 *ACF Chemiefarma v Commission* [1970] ECR 661, paragraph 94; Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line and Others v Commission* [2003] ECR II-3275, paragraph 138, and Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others v Commission* [2004] ECR II-1181, paragraph 47).

⁸⁷ While it is therefore true that infringements of which an undertaking is accused in a decision cannot be different than those in the statement of objections, the same does not go for the facts upheld, since it is sufficient, in respect of those facts, that the undertakings concerned were able to make their views known in relation to facts held against them. As has been held, there is no provision which prevents the Commission from sending to the parties after the statement of objections fresh documents which it considers support its argument, subject to giving the undertakings the necessary time to submit their views on the subject (Case T-23/99 *LR AF 1998 v Commission* [2002] ECR II-1705, paragraph 190; see also, to that effect, Case 107/82 *AEG-Telefunken v Commission* [1983] ECR 3151, paragraph 29).

⁸⁸ In the present case, it is undisputed that by letter of 25 August 2006 the Commission sent Fuji's statements to Siemens and invited it to submit its observations on those statements. Furthermore, those statements did not set out criticisms of Siemens which were new with regard to those set out in the statement of objections, but contained only one new piece of evidence which served to substantiate a criticism which had already been made in the statement of objections, namely the fact that there was a common understanding between the Japanese and European producers under which the Japanese producers were not to enter the European market.

89 Therefore, Fuji's statements can be held to be evidence against Siemens.

90 As regards the credibility which should be attached to Fuji's statements, it must be pointed out that, in so far as Fuji admitted, at least indirectly, that its absence from the European market was due in part to the common understanding, it acknowledged a fact which could be held against it by the Commission. It has already been held that statements which run counter to the interests of the declarant must in principle be regarded as particularly reliable evidence (*JFE Engineering and Others v Commission*, paragraph 49 above, paragraph 211).

91 That remains the case even if, in the present case, Fuji applied to benefit from the Leniency Notice. In the first place, Fuji's statements were not drawn up in the context of that application, but in reply to the statement of objections, even if the two documents were drawn up almost simultaneously. In the second place, Fuji's acknowledgement of the fact that it had been aware of the division of European and Japanese markets is not accusatory exclusively as regards the other undertakings — a circumstance which would result in that statement being handled with caution — but also contains an acknowledgement of an infringement on its part. In those circumstances, it must be held that, in the present case, a high level of credibility must be attached to Fuji's statement.

92 As regards, lastly, the content of Fuji's statement, it must be observed that, in that statement, Fuji does not merely admit to a sharing of markets between the European and Japanese producers but also gives details of the respective objectives of undertakings which participated in the cartel, which allows other conclusions to be drawn. Fuji states that, in so far as it was concerned, the common understanding was not the main reason for which it refrained from entering the European market and gives a whole range of reasons which, according to it, were more significant for its decision. In particular, its assertion that its share of the world market was too small to justify incurring the sunk costs necessary to develop a European base allows the conclusion to be drawn that those Japanese producers — and, conversely, the European

producers — which held a greater market share would have been able to overcome the technical and commercial barriers to entry on to the protected markets of the respective groups of producers and to make such an investment profitable. From that perspective, the greater the market share a given undertaking held, the less the argument relating to technical and commercial barriers mattered for that undertaking and, conversely, the more significant becomes the prohibition on entering the markets of the other group of producers, agreed on in the context of the common understanding.

⁹³ If the market shares — which were based on sales figures given by the undertakings themselves and have not been disputed in the present case — established by the Commission in recitals 484 to 488 of the contested decision are considered, it appears that Fuji was by far the smallest GIS producer participating in the cartel, with a maximum of 2 % of the worldwide turnover of the undertakings participating in the cartel, in relation to GIS projects. The market shares of the other Japanese producers were clearly greater and included between 15 and 20 % for Melco, between 8 and 12 % for Toshiba, and between 4 and 7 % for Hitachi. Siemens, for its part, held a market share situated between 23 and 29 %. Therefore, the conclusion can be drawn from Fuji's statement that protection of the European and Japanese markets for the benefit of the European and Japanese producers respectively was of interest for the majority of the undertakings in question, since their clearly greater market share than Fuji's enabled them more easily to bear the costs of entering the markets of the other group of producers.

⁹⁴ In addition, it must be observed that the Commission does not dispute the existence of technical and commercial barriers to entry on to the respective markets of the European and Japanese groups, but rather it disputes the consideration that those barriers could not be overcome in a profitable manner. In that regard, it relied on two GIS projects in the Czech Republic. The first was carried out by Fuji and the second

was subject to a bid from Melco, which has not been disputed by Siemens. They show that there were not insurmountable technical and commercial barriers to the entry of the Japanese producers on to the European markets, which tends to support the Commission's argument that the undertakings which participated in the cartel had a subjective interest in the producers of the other group not trying to overcome those barriers.

- ⁹⁵ In conclusion, Fuji's statements constitute evidence, with a high level of credibility, of the existence of a division of the European and Japanese markets in favour of the respective groups of producers.

Hitachi's statements

- ⁹⁶ Hitachi stated that the GIS projects in Europe, which were shared among the European producers, were set against the joint 'European' quota in the context of the GQ Agreement and that, for that reason, the Japanese producers were informed, afterwards, until 1999, of the outcome of the sharing of GIS projects in Europe between the European producers. In its reply to the statement of objections, Hitachi indicated as follows:

'Hitachi confirms that prior to 1999 the European GIS suppliers would disclose to the Japanese GIS suppliers details of GIS projects that they would be supplying in Europe. Hitachi further confirms that the purpose of such reports was to ensure that the value of European projects was taken into account when agreeing the quota of projects to

be allocated between the European suppliers and Japanese suppliers outside of Europe pursuant to the GQ Agreement ...

In terms of understanding the substantive irrelevance of this mechanism when it was in operation (i.e. prior to 2002), it must be emphasised that the reporting of the details of projects in Europe under the GQ cartel was not linked to, or evidence of, any acquiescence by the Japanese suppliers to stay out of the European market since no “common understanding” existed. Perhaps more importantly, however, the allocation of European GIS projects pursuant to the European cartel in no way “resulted from” any communications between the European GIS suppliers and the Japanese GIS suppliers as alleged by the Commission. Any communications between European and Japanese GIS suppliers occurred after the allocation of European GIS projects had taken place.’

⁹⁷ That statement is instructive in a number of respects. First, by explicitly confirming that GIS projects in Europe carried out by European producers were set against their global quotas in the context of the GQ Agreement, Hitachi confirms the Commission’s contention that the European producers, including Siemens, reached agreements on projects within the common market (during the early years of the operation of the cartel, Eastern Europe was still not accessible as a market) and that, therefore, the cartel did have effects within the common market and the EEA.

⁹⁸ Second, Hitachi’s statement also constitutes, irrespective of the intention of its author, an indication which supports the Commission’s contention that the European markets were reserved at a worldwide level to European producers. Hitachi insists, on a number of occasions, on the fact that the Japanese producers were informed *a*

posteriori. First, Hitachi draws the conclusion that the Japanese producers were not implicated in the collusive practices of the European producers. Second, it considers that that information had no link with an obligation on the Japanese producers to remain outside the European markets nor did it prove such an obligation, and it disputes the existence of the common understanding.

⁹⁹ However, there is no logical explanation for the fact — also acknowledged by Hitachi — that the GIS projects in Europe, which were shared among the European producers, were set against their global quotas, if, in any event, the European markets were not accessible to Japanese producers for technical and commercial reasons. In such a situation, European producers would have had no reason to accept that those projects be set against their global quota, which greatly reduces the number and value of GIS projects on the world markets which they could claim in the context of the cartel. On the contrary, the fact that the European producers consented to that consideration shows that the fact that the Japanese producers refrained from entering the European markets had, for the European producers, a value which could justify that consideration.

¹⁰⁰ As regards the credibility of Hitachi's statement, it must be noted that Hitachi applied to benefit from the Leniency Notice. Therefore, its statements must be considered carefully in so far as such statements are, by nature, exclusively accusatory with regard to the other undertakings. However, that is not the situation here. The inference which can be drawn from Hitachi's statement, that the Japanese producers had accepted that they would not enter the European markets, runs counter both to Hitachi's interests and those of the other participants in the cartel, inasmuch as it confirms a fact which could be held against it. Moreover, Hitachi was clearly unaware of all of the conclusions which could be drawn from the content of its statement, notably

in relation to the reserving of the European markets for the benefit of the European producers, which tends to increase the credibility of its statement.

¹⁰¹ In conclusion, a high level of credibility must be attached to Hitachi's statement.

The failure of Areva, Alstom and the VA Tech Group to dispute the common understanding

¹⁰² Concerning the failure of Areva, Alstom and the VA Tech Group to dispute the common understanding, it must be held that the evidence on the case-file does not allow a high probative value to be attached to that fact, and does not substantiate the Commission's allegations.

¹⁰³ As regards, first, Areva and Alstom, the Commissions states, in recital 125 of the contested decision, that those two companies did not challenge the common understanding as referring to respect for the traditional privileged positions on the home markets of undertakings participating in the cartel in their final statements of 21 and 26 November 2006 respectively, following receipt of Fuji's reply acknowledging the common understanding. However, neither Siemens nor the Commission made reference to the failure of Areva and Alstom in their written pleadings before the Court. In those circumstances, it must be held that that issue does not form part of the present dispute.

104 Concerning, second, the VA Tech Group, the Commission states, in recital 125 of the contested decision, that that company did not openly challenge, in its reply to the statement of objections, details relating to the common understanding. In that regard, first, it must be stated that that reply does not figure in the case-file and the Court has available to it only footnote 79 in the contested decision, worded as follows ‘also without the presumed common understanding, the Japanese suppliers [would] have stayed away from the European market because of the high barriers to entry, as will be explained below.’ Second, it must be held that the mere fact that a company did not openly challenge certain facts can have only a very limited probative value, all the more so since it is not possible to ascertain the context of the absence of a challenge on the sole basis of such an isolated quote. Third, it must be observed that, even taken in isolation, that quote does not have the content which the Commission lends to it. In that regard, it is necessary to emphasise the use of the word ‘presumed’, by the VA Tech Group to describe the common understanding. It follows from the use of that word that, while the VA Tech Group did not explicitly challenge the existence of that understanding, it did not all the same admit it, even implicitly. On the contrary, the passage quoted must be interpreted as an implicit challenge to the existence of the common understanding.

105 Therefore, the alleged failure of Areva, Alstom and the VA Tech Group to dispute the common understanding cannot be held to be evidence confirming the Commission’s contention regarding the reservation of the European markets for European producers and the protection of ‘home countries’.

The list of GIS projects in Europe

106 The list of 11 GIS projects relied on by the Commission in recital 164 of the contested decision relates to an extract of a list of GIS projects, discussed within the cartel

during the period between 1988 and 1999, entitled ‘Enquirylist1’ and produced by ABB (‘the global list’), which contains information, *inter alia*, in relation to cut-off dates for each of the projects for the submission of bids from undertakings which had shown an interest, and in relation to the outcome of the discussions within the cartel (that is to say, the allocation to a member of the cartel or the fixing of a minimum price).

¹⁰⁷ According to that information, in respect of the 11 GIS projects in Europe on the global list, the order was obtained, for six of those projects, by the undertaking to which the project had been allocated within the cartel, which was the case on three occasions for ABB and Siemens respectively. In respect of the five other projects, the global lists explain that they were not allocated to one of the undertakings which participated in the cartel, but were subject to an understanding on the minimum price level, that is to say, the European undertakings participating in the cartel agreed on the minimum price which they would propose in the context of their possible responses to the tender at issue.

¹⁰⁸ Siemens first tried, generally, to cast doubt on the reliability of the information contained in the global list, without however explicitly contesting either the existence of the projects which were on the list or, in particular, the existence of 11 GIS projects in Europe which are mentioned in the list, or even the fact that those projects were discussed within the cartel.

¹⁰⁹ In that context, Siemens contended, *inter alia*, that a certain number of projects are mentioned on several occasions, that numerous projects were never implemented and that, at no point, does the global list indicate that a GIS project within the EEA was allocated to it. In two cases where it obtained the project in question, that was the result of competitive practices. In addition, Siemens refers to an analysis of the global list carried out by an independent company, which shows, *inter alia*, that the

GIS projects within the EEA were not the subject of a sharing system operating in a manner comparable to that laid down in the GQ and EQ Agreements.

¹¹⁰ In addition, in the context of its replies to the written questions of the Court before the hearing, Siemens disputed whether the 11 GIS projects in Europe which were on the global list were the subject of agreement within the cartel.

¹¹¹ Those claims will be examined in paragraphs 116 to 138 below.

— The origin of the list, the date on which the global list was established and the classification of the list as evidence

¹¹² It must be stated, as Siemens has pointed out, that it has not been possible to determine with certainty the origin of the list and the date on which it was established.

¹¹³ In that regard, it is however necessary to note, as is apparent from recital 88 and footnote 21 of the contested decision, that the global list was produced by ABB on 7 May 2004, that is to say, one day after the date appearing on the top of its first page, 6 May 2004, a date which therefore is very probably either the date on which it was established or the date when it was printed. Furthermore, it must be observed that ABB benefited vis-à-vis the other members of the cartel from an additional coding on that list. The European members — with the exception of ABB — and the Japanese members appear in the column entitled ‘Member’ in that list, in two groups, under their respective codes, as used within the cartel. On the other hand, ABB is ‘hidden’, according to the expression used by Mr M. in the context of his hearing at the Commission, on 23 September 2005, in the column entitled ‘GCs’, generally intended for

reference to possible general contracts. According to the information from Mr M., that was a precaution taken following an investigation carried out by the Swedish competition authorities in relation to ABB.

¹¹⁴ Those two facts allow the presumption that the global list was initially established by ABB for the purposes of its own internal following of the cartel and that it was reprinted in order to be produced before the Commission. It is therefore necessary to rely on that presumption, which is moreover the most favourable to Siemens, as it disputes being the author of the global list.

¹¹⁵ Therefore, it is appropriate, as Siemens claims, to classify the global list as being part of ABB's statements. Given that, as has been shown, the global list was either established by ABB, or printed by it from an internal electronic form, at a time close to when it made its statements for the purposes of its application for immunity pursuant to the Leniency Notice, it cannot be held to be documentary evidence. It follows that the considerations, referred to in paragraphs 64 to 67 above, on the probative value of ABB's statements are also valid in relation to the global list. In particular, the information gleaned from the global list cannot be used to support ABB's statements but, on the contrary, must themselves be substantiated by other evidence, in accordance with the case-law cited in paragraph 66 above.

— The contention that the GIS projects in Europe referred to on the global list were not discussed within the cartel

¹¹⁶ As has been indicated in paragraph 110 above, in the context of its reply to the written questions of the Court before the hearing, Siemens disputed, for the first time,

whether the 11 GIS projects in Europe on the global list had been the subject of agreement within the cartel. Admittedly, it stated, following a question in that regard at the hearing, that it had already raised that challenge during the administrative procedure before the Commission and in the application. However, the application, in that regard, contains only those elements set out in paragraph 109 above and, even assuming Siemens had raised that challenge during the administrative procedure, that circumstance would not have compensated for the absence of that challenge before the Court at the application stage. Siemens' contention that the 11 GIS projects in Europe, on the global list, were not the subject of agreement within the cartel must therefore be rejected as out of time, in accordance with Article 48(2) of the Rules of Procedure.

117 Moreover, it is important to emphasise the detailed nature of the information contained in the global list. That list contains, inter alia, information regarding the specifications of equipment supplied for the projects in question, the date for submission of offers, the dates for consideration within the cartel, the show of interest in the projects on the part of various members of the cartel, the identity of the undertaking which might be allocated the project or reference to the fact that a minimum price had been decided upon and, where appropriate, an indication that the project had actually been obtained by the undertaking to which it had been attributed. It cannot be accepted that information of such range and with such detail can be disputed by a mere contention that the 11 GIS projects in Europe were not the subject of agreement within the cartel.

118 It must be borne in mind, in that context, that Siemens does not dispute that it undertook the task of European secretary to the cartel during the period between 1988 and 1999. It must therefore automatically have been aware of all of the projects discussed within the group of European producers and, therefore, have been in a position to challenge in a detailed and individual manner the projects listed by ABB on the basis of its own files, in the event that there had been an error. The fact that Siemens neither used that opportunity, nor explained why it could not do so, enables

it to be stated that Siemens has not properly contested the fact that the projects on the global list and, in particular, the 11 projects within the EEA were the subject of agreement within the cartel.

- ¹¹⁹ Siemens assertion, made in the context of its reply to the written questions of the Court before the hearing, according to which the 11 projects in question were to be undertaken outside the EEA at the material times, must be rejected as mistaken. Among those 11 projects, discussed within the cartel between 1992 and 1998, figured three projects in Spain, one project in Denmark, one project in Ireland and one project in Portugal, all of which had joined the Community before 1988. Likewise, the two projects in Finland, dating from 1994 and 1995, are unquestionably covered by the EEA Agreement and the EC Treaty respectively, as the Republic of Finland has been a member of the EEA since 1 January 1994 and a member of the Community since 1 January 1995. A similar finding must be made for the project in Iceland and the two projects in Norway, both dating from 1998, a date by which the Republic of Iceland and the Kingdom of Norway were members of the EEA. All those countries were thus, at the time when the project in question was discussed, part of the common market or the EEA.

- ¹²⁰ In addition, it is necessary to reject Siemens' contention that the global list is 'obscure'. It is true that that list, which is created in the form of a table, uses different codes comprising numbers and/or letters. However, an explanation regarding those codes was provided to the Commission, in particular by Mr M. at his hearing on 23 September 2005, and it must be held, in the light of that explanation, that the global list gives a clear picture of the manner in which the GIS projects were handled within the cartel.

— The projects which were allegedly mentioned on several occasions or which were not implemented

¹²¹ Siemens claims that some of the projects on the global list were mentioned on several occasions. In that regard, it must be pointed out that, even if that allegation were substantiated, it would in no way affect the relevance and credibility of the global list and, therefore, its probative value. First, Siemens does not specify which projects it is referring to and does not indicate whether they are one of the 11 GIS projects in Western Europe; those projects being the only ones on which the Commission specifically relies in the contested decision and, therefore, the only relevant projects for the purposes of assessing the contested decision. On the other hand, the fact that a list comprising over 1 500 entries might contain some errors is not such as to undermine the entire list.

¹²² As regards Siemens' allegation that some of the projects on the global list were never implemented, it must be noted that Siemens does not specify those projects to which it is referring. Moreover, even if such an allegation were substantiated, the fact that some of the projects were not implemented is not, on any reading, such as to preclude Article 81 EC and Article 53 of the EEA Agreement applying to undertakings which rigged the bids relating to those projects in the context of a cartel.

— The low number of GIS projects in Europe recorded on the global list

¹²³ Siemens claims, without being challenged by the Commission, that, of the more than 1 500 GIS projects recorded on the global list, only 11 projects were to be carried out

within the EEA. It is true that that low number does not reflect the importance of the European markets. However, it must be held that that circumstance does not justify not taking account of the information contained on that list.

¹²⁴ First, neither ABB nor the Commission alleged that the global list included all of the projects earmarked by the cartel. In addition, the absence, to a large extent, of ‘European’ projects on that list tallies with the argument that there were ‘home countries’ which were automatically reserved for certain undertakings, without the projects carried out in those countries being set against the quotas under the cartel. Lastly, the Commission relied on the existence of additional cartels at a national level, within which projects could have been handled; projects which were also mentioned by Mr M. He explained that, in the majority of European countries which were not ‘home countries’, there were longstanding local cartels between different European producers, the functioning of which was not to be affected by the GQ Agreement and the EQ Agreement. Therefore, it was decided not to integrate those countries into the procedure for allocating projects established by those agreements, but simply to register the allocation of GIS projects to be carried out in those countries in order to set them against the global quota of the European undertakings.

¹²⁵ Both in the case of ‘home countries’ and in the case of pre-existing local cartels, it was not necessary to discuss the GIS projects to be carried on in those countries in the context of the global cartel, which may explain the small number of ‘European’ projects on the list of projects allocated in that context, in particular in relation to national markets as important as those of France, Germany and Italy, which were all, according to the Commission’s findings, ‘home countries’ at the start of the cartel.

¹²⁶ Without it being necessary to rule definitively on the existence of the alleged pre-existing local cartels, it must therefore be held, in the light of the circumstances of the

present case, that the small number of GIS projects in Europe recorded on the global list does not prevent account being taken, in assessing the evidence, of information contained in that list and, in particular, details of the 11 GIS projects in Europe which appear on that list.

¹²⁷ In addition, as the Commission pointed out in its defence, Siemens' reasoning, based on the alleged exclusion of European markets — with the exception of those of Liechtenstein and Iceland — from the scope of the cartel, even if it were established, is not capable of explaining why the global list should contain even one GIS project within the EEA. In its reply, Siemens did not take a view on that point. In reply to a written question of the Court in that regard, Siemens merely disputed whether the 11 GIS projects in Europe on the global list had been the subject of agreement within the cartel. Yet, as has been noted in paragraphs 116 and 117 above, that line of argument must be rejected, as it was raised for the first time at the stage of the oral procedure.

¹²⁸ It follows that the small number of GIS projects in Europe on the global list does not call into question the fact, established by that list, that GIS projects in Europe were discussed and allocated within the cartel.

— The alleged failure to allocate GIS projects in the EEA to Siemens, in the context of the cartel

¹²⁹ Siemens claims that the global list indicates no instance in which a GIS project, to be carried out within the EEA, was allocated to it. In that regard, it should be recalled,

first, that, even if that allegation from Siemens were well founded, that would not preclude Article 81 EC and Article 53 of the EEA Agreement being applied to it, since it participated in an unlawful cartel covering the common market and the EEA by discussing projects and decisions on allocating those projects to other undertakings. Such actions affect, in and of themselves, the nature of competition, irrespective of the identity of the undertaking to which the project is, in the final analysis, allocated.

¹³⁰ In any event, Siemens' allegation that the global list does not refer to projects allocated to it is wrong. In recital 164 of the contested decision, the Commission cites three projects, in respect of which Siemens obtained the orders, namely project No 1327, project No 0140 and project No 0144. In relation to two of those projects, namely project No 0140 and project No 0144, it follows from the global list that Siemens was the only undertaking interested in the projects in question and that it obtained the order in the end. By contrast, in relation to the third project, bearing No 1327, it follows from the global list that, besides Siemens, ABB and Alstom had also shown interest in that project and that the project was allocated to Siemens during discussions within the cartel.

¹³¹ Lastly, as regards Siemens' argument, in respect of two of the projects — which it did not identify — for which it obtained the orders, that those orders were the result of competitive practices, it is for Siemens to show that the orders obtained under such circumstances — namely, after notification and discussion within the cartel — resulted from competitive practices. In that regard, it must be pointed out that, even if the infringement was limited to notification and discussion of projects, that would still have been likely to affect competition in the relevant market. By way of example, the global list does not mention, apart from Siemens, other undertakings which showed an interest in project No 0140 and project No 0144. Therefore, Siemens knew, following discussions of those projects within the cartel, which took place on 25 June and 16 July 1998 respectively, that there would not be other bidders, which allowed it, for example, to fix higher prices for its bids. In addition, in such a case — that is to say, in

a case where only one of the undertakings has shown interest in a project — a specific allocation of projects serves no purpose, since the only interested undertaking could then be certain of obtaining the project. It therefore appears absolutely normal that the members of the cartel did not make a formal allocation in such instances, a fact which is not such as to preclude Article 81 EC and Article 53 of the EEA Agreement from being applied as regards the undertaking which obtained the order.

- ¹³² Accordingly, Siemens' argument alleging that there was no allocation of GIS projects to it within the EEA in the context of the cartel must be rejected.

— The econometric analysis produced by Siemens

- ¹³³ Siemens relies on the econometric analysis of the global list carried out by a third-party company at its request ('the analysis'). According to Siemens, that analysis reveals that, in the global list, only a small part of the volume of the market was recorded during the period in question, representing less than 4% of GIS projects in European countries, except for 'home countries' and that the GIS projects within the EEA were not the subject of a sharing system operating in a manner comparable to that laid down in the GQ and EQ Agreements. The analysis also showed that the explanation for the fact that the European and Japanese producers did not enter on to the respective home markets of the other group was not a cartel, but barriers to access to the markets which had continued to exist even after the liberalisation of the energy markets. Lastly, the analysis also showed that there was no protection of 'home

countries', in particular on account of the fact that both Siemens and ABB were very active on 'home markets' which were not their own.

¹³⁴ In the present case, the Commission did not rely on the European projects on the global list to prove the existence of the common understanding or to prove the actual effects of the cartel. It based the contested decision primarily on the agreement's objective of restricting competition sanctioned in Article 1 of the contested decision. Thus, it first stated, in recitals 303 and 304 of the contested decision, that the complex of agreements and/or concerted practices described had as its object the restriction of competition within the meaning of Article 81 EC and Article 53 of the EEA Agreement and that, in those circumstances, for the purpose of applying those provisions, there was no need to take into account the actual effects of an agreement, before adding, in recital 308 of the contested decision, that, by its very nature, the implementation of a cartel agreement of the type described leads to a significant distortion of competition.

¹³⁵ In that regard, it must be borne in mind that, according to settled case-law, it follows from the actual text of Article 81(1) EC that agreements between undertakings are prohibited, regardless of their effect, where they have an anti-competitive object (see *Commission v Anic Partecipazioni*, paragraph 43 above, paragraph 123, and *JFE Engineering and Others v Commission*, paragraph 49 above, paragraph 181). Consequently, it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is proved (see Case T-62/98 *Volkswagen v Commission* [2000] ECR II-2707, paragraph 178, and the case-law cited).

¹³⁶ In those circumstances, in the first place, the analysis produced by Siemens is ineffective as evidence inasmuch as, by its nature, it cannot provide information on the effects of the cartel, whereas the finding of an infringement of Article 81(1) EC made by the Commission is based, in essence, on the finding of a cartel which had the object of restricting competition. Even assuming that, as Siemens alleges, analysis did not allow

identification of indicia of the cartel which was alleged by the Commission, that fact would not be such as to invalidate the finding of a cartel seeking to prevent, restrict or distort competition, in so far as the existence of that cartel is proved to the requisite legal standard. Therefore, Siemens' line of argument relating to the fact that the cartel at issue had no effects, even if well founded, cannot in principle, on its own, lead to the annulment of Article 1 of the contested decision (see, to that effect, *C-277/87 Sandoz prodotti farmaceutici v Commission* [1990] ECR I-45; Case T-143/89 *Ferriere Nord v Commission* [1995] ECR II-917, paragraph 30, and *JFE Engineering and Others v Commission*, paragraph 49 above, paragraph 183).

¹³⁷ In the second place, the analysis cannot be regarded as a neutral and independent expert report, in so far as it was requested and paid for by Siemens and drawn up on the basis of information provided by that company, without the accuracy or the relevance of that information being subject to any kind of independent assessment. Therefore, it is not possible to attach a level of credibility and, therefore, a probative value beyond that of a mere statement from Siemens.

¹³⁸ Accordingly, the argument based on the results of the analysis produced by Siemens must be rejected.

The documentary evidence

¹³⁹ As regards the documentary evidence, the Commission relied, in essence, on the GQ Agreement and the EQ Agreement together with their annexes; an undated document found during the Commission's inspections at the premises of the VA Tech

Group, entitled ‘Summary of discussions with JJC’; an email exchange of 18 January 1999 between Mr Wa., Mr J. and Mr B., employees of the VA Tech Group; an internal note of 2 December 2003, drafted by Mr We., employee of the VA Tech Group; two facsimiles of 21 July and 18 December 2003 from ABB to Siemens and to Alstom, and an undated internal note, drafted around September 2002 by Mr Zi., an employee of the VA Tech Group.

— The GQ Agreement and the EQ Agreement

¹⁴⁰ First, it must be noted that, in relation to the GQ Agreement and the EQ Agreement together with their annexes, while it is true, as set out in paragraphs 55 to 58 above, that their mere wording does not prove the existence of a cartel having effects within the EEA — still excluding Liechtenstein and Iceland, as indicated in paragraph 55 above — the EQ Agreement contains two provisions capable of providing indicia regarding the cartels effects on the common market.

¹⁴¹ In the first place, Article 2 of the EQ Agreement, entitled ‘Notification’ provides:

‘E-members will notify enquiries as usual. For discussion with J-group E-members will notify enquiries to [the European secretary to the cartel] by using GQ notification formula as per Appendix No. 1.’

¹⁴² In that regard, it must be held that ‘as usual’ allows it to be inferred that there were notifications and, therefore, a cartel, prior to the conclusion of the GQ Agreement and the EQ Agreement, which were both concluded on 15 April 1988, a fact which the Commission stated in the contested decision, without insisting on that point and without stipulating penalties in that regard, and one which Siemens disputes. Those words cannot be understood to mean ‘by using the form provided for the purposes of the GQ Agreement’ since the second sentence in Article 2 of the EQ Agreement would then be redundant with regard to the first.

¹⁴³ In the second place, Annex 2 to the EQ Agreement, which contains a ‘Communication scheme’, provides, *inter alia*, that ‘the [European secretary] notifies projects [notified by the European producers] automatically to [the Japanese] side except the European projects’ and that ‘MM decide about notification of European projects to J-group’. It must be specified, in that regard, as is also clear from that annex, that ‘MM’ means ‘members meeting’. In addition, it is apparent from Annex 1 to the GQ Agreement that the ‘E-Group’ and the ‘J-Group’ described the groups of European and Japanese producers respectively. Moreover, according to the Commission’s findings in recital 147 of the contested decision, not disputed by Siemens, the latter occupied the position of European secretary to the cartel during the entire period of its first participation in the cartel from 1988 to 1999.

¹⁴⁴ It follows therefore from Annex 2 to the EQ Agreement that the GIS projects in Europe were dealt with within the group of European members of the cartel and, second, that those projects were dealt with differently than the GIS projects in the rest of the world, inasmuch as they were not automatically notified to the group of Japanese producers but only after a specific decision of the group of European members.

¹⁴⁵ Such communications, even accepting that they are made only occasionally after a specific decision and/or *a posteriori* and worldwide, as Hitachi claims (see paragraph 96 above), are inconceivable without having a reason. On the contrary, in the context of a cartel, such as that established by the GQ Agreement and the EQ Agreement, the only conceivable reason to send such communications is that the information in question is used to implement the cartel. In the present case, more specifically, given that, as it was pointed out in paragraph 55 above, the large majority of European countries were excluded from the project sharing between the European and Japanese groups of producers pursuant to the GQ Agreement, there is no other possible explanation for the communications of sales made by European countries in those countries than that they were set against the global quota of European producers under the cartel. As has been explained in paragraph 98 above, the setting of sales in European countries — outside ‘home countries’ — against the global quota is in turn a significant indicator of the existence of an obligation on the Japanese producers to refrain from entering the European market, under the common understanding.

¹⁴⁶ In any event, the arguments submitted by Siemens in that regard cannot succeed. First, Siemens’ assertion, that the Commission is attempting to rely on possible agreements in central and Eastern Europe as proof of infringements allegedly committed in the EEA, or on agreements added during the period from 2002 to 2004 in order to show the effects of the cartel during the period 1988 to 1999, is unfounded. The Commission has merely relied on the fact that discussions apparently took place between the groups of European and Japanese producers, with regard to the issue whether the Central and Eastern European markets, newly accessible following the fall of the iron curtain in 1989, should also be reserved to the European producers. In that context, it referred, in recitals 126 and 127 of the contested decision, to certain projects in those countries which were subject to discussion with the Japanese producers, to show that they had, in principle, an interest in and the option of supplying those markets. Such reasoning cannot be regarded as inappropriate in and of itself.

147 Second, Siemens' argument that the communication to the group of Japanese producers could have concerned only projects in the countries of Central and Eastern Europe must be rejected. As the Commission correctly states, those countries were not, at the time when the GQ Agreement and the EQ Agreement were concluded, accessible to western suppliers. Therefore, the European projects referred to in the communication scheme had to be carried out in Western Europe, the majority of which — except for Switzerland — were part of the EEA from 1994. Likewise, contrary to what Siemens claims, the Commission's line of argument is not illogical. The Commission in no way alleged, as Siemens would have one believe, that the obligation to notify had been 'automatic' or 'obligatory'. On the contrary, it was entirely sufficient, for the Commission's purposes in relation to that communication, that it was carried out worldwide and *a posteriori*, after a specific decision by the group of European members of the cartel.

148 Lastly, it must be pointed out that Siemens gives no convincing explanation as to why the communication scheme provided for the notification of GIS projects in Europe to the group of Japanese producers, even if not in a systematic manner and only after a specific decision of the group of European producers. In reply to a question from the Court at the hearing, Siemens claimed that the communications at issue could at most concern only the 11 GIS projects in Europe, referred to by the Commission in recital 164 of the contested decision, and therefore a very limited number of projects which represented only 1 % of the volume of projects on the global list. But, as has been pointed out in paragraph 125 above, the small number of 'European' projects on the global list does not mean that the cartel did not set aside other projects in Europe, but can be explained by the fact that it was not necessary to discuss such projects in the context of the general cartel, in the presence of the Japanese producers. Therefore, the global list cannot be relevant for determining the number of projects for which communications were sent to the Japanese producers, in accordance with the communication scheme in Annex 2 to the EQ Agreement.

149 It follows that Annex 2 to the EQ Agreement constitutes a valid piece of evidence for the Commission's finding that the projects located in Western Europe were part of the projects discussed and shared between the European producers and that the Japanese producers had to remain outside the European markets, in consideration for which the sales made by European producers in those countries were set against their global quota.

— The document found on the premises of the VA Tech Group, entitled 'Summary of discussions with JJC'

150 In recital 135 of the contested decision, the Commission relies on a document found on a laptop computer during the inspection at the premises of the VA Tech Group, entitled 'Summary of discussions with JJC' and drawn up, according to the Commission, on 10 June 2003. That document is, in part, difficult to comprehend but nevertheless allows certain conclusions to be drawn. In particular, it makes reference, on two occasions, to the concept of 'pays constr.' which cannot reasonably be understood other than as 'home countries.' Further, in that document reference is made to the 'Last study made in February 99 — Exp. Outside E and manufacturing countries' and, for each of the European members, identified by codes valid from July 2002, which Siemens does not dispute, the applicable quotas for before and after '02/99' (signifying February 1999) are mentioned. That document also indicates the market shares of the European members on the European markets excluding 'home countries' between 1988 and 1999 and includes a non-exhaustive list of European countries which were not home countries ('Fin, Dan, Nor, Es, Po, Irl, Bel, Gre, Lux.').

151 As regards the probative value and the credibility to attach to that document, it must be taken into account that the author, who is unknown, comments on facts going back about four years before the date on which the document was created, which

he heard from another unknown individual. The person described as 'JJC' has not been identified and his initials do not correspond to any of the persons referred to by the Commission in Annex II to the contested decision, as having participated in the cartel. While those circumstances are not such as to remove all probative value from that document, they are none the less such as to invoke a certain circumspection with regard to the conclusions to be drawn, in particular as regards the value to attach to the detailed information which it contains, and justify attaching only moderate probative value to that document.

- ¹⁵² Therefore, it is necessary to attach some probative value to the fact that the concept of 'home countries' is not only mentioned twice in the document, but that the document also contains a non-exhaustive list of the countries which were not 'home countries', and to the fact that there was a different scheme applicable between home countries and other countries, inasmuch as the quotas fixed within the cartel were not applicable to the latter. In relation to that last point, it must be pointed out that the quotas indicated in the document as being applicable after '02/99' correspond exactly to those stated by the Commission in recital 145 of the contested decision, on the basis of other evidence, as applicable towards the end of the first phase of Siemens' participation in the infringement.

- ¹⁵³ Furthermore, it can also be inferred from that document that the European producers within the cartel exchanged information of the volume of their sales in Europe, excluding 'home countries.' The fact that the undertaking within the VA Tech Group ('the VA Tech undertaking') had knowledge of precise figures on market shares in Europe (excluding 'home countries') for a period of 10 years, cannot be explained other than by the fact that those producers informed each other of their sales in Europe, excluding 'home countries.'

— The emails exchanged on 18 January 1999 between Mr M., Mr Wa., Mr J. and Mr B. who were employees of the VA Tech Group

- ¹⁵⁴ On 18 January 1999, Mr Wa. sent an email to Mr J., who forwarded it, the same day, in printed and annotated form, by facsimile, to Mr B. In that email, the subject-matter of which was ‘Siemens in UK’, Mr Wa. warned Mr J. that Siemens was about to create an alliance with another company for projects in the United Kingdom, which was perceived as a threat and had been declared, within ‘U.K. forum’ as ‘Bad Behaviour’. However, as no explanation had been received, Mr Wa. proposed waiting to see what would happen. In the facsimile, Mr J. advocated reacting by threatening to enter the German market in the 400 kilovolts GIS sector. Furthermore, he recalled the VA Tech Group’s position that the United Kingdom market historically belonged, in equal shares, to Reyrolle and GEC (whose GIS activities were merged with those of Alstom in 1989) and that any other undertaking obtaining orders would have to compensate for that, but regretted that the mechanisms provided to that effect were weak.
- ¹⁵⁵ In the context of its reply to the written questions of the Court, Siemens contends that the only fact which arises from that document is that, in the opinion of the author of the email, Siemens appeared to be an aggressive competitor on the United Kingdom market. By contrast, it did not allow confirmation of the existence of protected ‘home countries’.
- ¹⁵⁶ First, it must however be held that that exchange of emails confirms, in the context of the cartel, the existence of protection of the United Kingdom market for the benefit of the producers who historically were present on that market, namely Reyrolle and GEC, something which can be categorised, in essence, as protection of a ‘home country’, although that term is not used. The fact that other European members of the cartel had been active on that market does not preclude such an interpretation, since a compensation mechanism clearly existed, even if apparently it was not functioning

satisfactorily. Second, it is apparent from the facsimile that the VA Tech undertaking had up until then remained outside the German market — at least in the 400 kilovolts GIS sector — for reasons which were neither technical nor commercial, since entry on to that market was envisaged as an act of reprisal against Siemens. The existence of protection of the German market as a ‘home country’ must be inferred therefrom, in the absence of an alternative plausible explanation. Third, it is apparent from the email that a ‘UK forum’ existed, in which problems relating to the United Kingdom market were discussed. Without it being necessary, in the context of the present case, to adjudicate definitively in that regard, it could relate to a forum for local concerted practice for members of the cartel active on that market.

- ¹⁵⁷ As documents drawn up during the cartel by individuals involved in it, those emails constitute evidence with a very high probative value.

— The documentary evidence concerning facts occurring outside the period between 2002 and 2004

- ¹⁵⁸ As regards the internal note of 2 December 2003, drafted by Mr We. and summarising a meeting which took place on 1 and 2 December 2003; the facsimile of 21 July 2003 sent by ABB to Alstom and Siemens concerning a meeting on projects in Germany; the facsimile of 18 December 2003 sent from ABB to Alstom concerning the situation on the United Kingdom market; and the undated internal note, drafted around September 2002 by Mr Zi., it must be observed that those four documents concern solely situations and events falling clearly within the period between 2002 and 2004.

- 159 As has been indicated in paragraph 37 above, the Commission's argument, that it is legitimate to apply observations relating to the period from 2002 to 2004 to the earlier period, as it is one and same infringement, must be rejected. On the contrary, given that, following the interruption by some undertakings of their participation, the cartel's activities during the years from 1999 to 2002 were reduced and that 2002 marked a new start with a modified system, it is, rather, necessary to show continuity in the objectives, the participants and the scope of the cartel in order to establish that it was in fact a single infringement.
- 160 Accordingly, it must be held that the four documents at issue cannot constitute evidence as regards the first phase of Siemens' participation in the cartel from 1988 to 1999.

(d) Findings on the second part of the first plea

The effects of the cartel within the EEA

- 161 The cartel had effects within the EEA, since the European producers discussed GIS projects within the EEA and shared them out. That fact is confirmed by the body of evidence consisting of ABB's statements, including the list of 'European' projects appearing in recital 164 of the contested decision and the statements of Mr M.; the statements of Fuji and Hitachi; Annex 2 to the EQ Agreement; the document 'summary of discussions with JJC'; and the exchange of emails of 18 January 1999. Amongst that

evidence, the statements of Mr M. and of Fuji and Hitachi, Annex 2 to the EQ Agreement and the exchange of emails of 18 January 1999 have a high probative value.

- ¹⁶² Melco's statements, which are relied on by Siemens as evidence to the contrary, do not, in the light of such a body of consistent evidence, cast doubt on that finding. Melco comments, in particular, on the scope of the global cartel, that is to say the co-ordination between the groups of European and Japanese producers, and on the fact that, in the context of the cartel, there were no discussions of the European market or of GIS projects in that market. In that regard, it states that it has no evidence of a cartel on the European market. On the other hand, as a Japanese undertaking, it would not have been informed of discussions held within the group of European producers. It explicitly leaves open the possibility that other undertakings which participated in the cartel might have expanded the subject-matter of their discussions to cover other issues, even pointing out, a number of times, that the Japanese producers had had to wait, before the beginnings of the cartel meetings, for the end of discussions between the European producers and it did not know the content of those discussions. Aside from the fact that Melco disputes the division of European markets and Japanese markets between the two groups of producers, and irrespective of whether its statements are credible, it must be noted that such statements cannot therefore be understood as supporting Siemens' position that there were no discussions or allocations of GIS projects in the EEA.

The reservation of European and Japanese markets for the groups of European and Japanese producers respectively

- ¹⁶³ The fact that the European and Japanese producers shared markets amongst themselves worldwide with the result that the Japanese market was reserved to Japanese

producers and the European market to European producers is confirmed by ABB's statements, those of Mr M., the statements of Fuji and Hitachi and Annex 2 to the EQ Agreement. Apart from ABB's statements, all those pieces of evidence have a high probative value.

The protection of 'home countries' in Europe

¹⁶⁴ The fact that there was protection for 'home countries' in Europe, with the result that the markets in those countries where European producers were historically present were reserved for those producers entirely and were not set against their quotas under the cartel, is confirmed by the body of evidence consisting of the statements of ABB and Mr M., the document 'Summary of discussions with JJC' and the exchange of emails of 18 January 1999. Amongst that evidence, the statements of Mr M. have a high probative value, and the exchange of emails of 18 January 1999 has a very high probative value.

¹⁶⁵ In summary, each of the objections disputed by Siemens is based on evidence which, apart from the statements of ABB and Mr M., is of high probative value and on other evidence of a lesser probative value. It must therefore be held that the entirety of that evidence shows the existence of the cartel alleged in the contested decision.

¹⁶⁶ As a result of all of the foregoing the Commission has established, to the requisite legal standard, the existence of a cartel for the period from 1988 to 1999 and, in particular, the fact that that cartel had effects within the EEA, the existence of market sharing between the European and Japanese producers, and the existence of protection of 'home countries'.

¹⁶⁷ It follows that the second part of the first plea must be rejected, as, accordingly, must the first plea in its entirety.

II — *The second plea, alleging infringement of Article 25 of Regulation No 1/2003*

¹⁶⁸ Siemens' second plea is divided into three parts. In the first part, it claims that the Commission has not proved that it participated in the cartel beyond the date of 22 April 1999. In the second part, it relied on the rules on limitation of actions. In the third part, it claims that it did not participate in the cartel after 1 January 2004.

A — The first part of the second plea, alleging failure to prove participation in the infringement between April and September 1999

1. Arguments of the parties

¹⁶⁹ In support of this part of the second plea, Siemens raises eight grounds of complaint, alleging, first, a failure to prove its participation in an agreement on projects after April 1999, second, a failure to prove its participation in a meeting after 22 April 1999, third, the contradictory and barely credible nature of ABB's statements, fourth,

the inadmissibility of Mr M.'s statements, fifth, a lack of clear documentary evidence of its participation in the cartel until September 1999, sixth, a lack of clear evidence resulting from the statements of the other undertakings which participated in the cartel, seventh, failure to take account of evidence establishing an interruption in its participation in the cartel from April 1999 and, eighth, failure to take account of empirical economic evidence of the interruption in its participation in the cartel in April 1999 at the latest.

¹⁷⁰ The Commission disputes the arguments put forward by Siemens.

2. Findings of the Court

¹⁷¹ It should be stated, at the outset, that it is not in dispute that Siemens interrupted its participation in the cartel in 1999. Rather, the parties dispute the exact date of that interruption. Siemens disputes that it participated in the cartel after 22 April 1999, the date of the Sydney (Australia) meeting which was the last in which it participated. The Commission, while admitting, as is apparent from recital 295 of the contested decision, that it was not possible for it to establish the exact date of that interruption, set the date of that withdrawal at 1 September 1999. It fixed that date on the basis of the statements of ABB and Mr M., and the indications contained in the document entitled 'Summary of discussions with JJC', found during the inspection of the premises of the VA Tech Group, and it considers that date confirmed by the statements of Areva, Melco, Fuji and Hitachi/JAEPS.

¹⁷² That disagreement raises the issue of which party bears the burden of proof in that regard. While Siemens considers that it is for the Commission to prove that Siemens

participated in the cartel until 1 September 1999, the Commission contends that, once it has shown that the undertaking participated in the cartel, that participation is presumed to continue until proof of its cessation, evidence of which must be adduced by the undertaking which participated in the cartel.

(a) The division of the burden of proof between Siemens and the Commission

¹⁷³ As regards the issue of the date on which Siemens' participation in the infringement ceased, as a preliminary point it is appropriate to recall the settled case-law that it is for the party or the authority alleging an infringement of the competition rules to prove its existence by establishing, to the requisite legal standard, the facts constituting an infringement, and it is for the undertaking invoking the benefit of a defence against a finding of an infringement to demonstrate that the conditions for that defence are satisfied, so that the authority will then have to resort to other evidence (*Peróxidos Orgánicos v Commission*, paragraph 65 above, paragraph 50; see also, to that effect, *Baustahlgewebe v Commission*, paragraph 43 above, paragraph 58, and *Aalborg Portland and Others v Commission*, paragraph 48 above, paragraph 78).

¹⁷⁴ In the present case, the general principle that the Commission is required to prove every constituent element of the infringement, including its duration (see, to that effect, Case T-43/92 *Dunlop Slazenger v Commission* [1994] ECR II-441, paragraph 79; Case T-48/98 *Acerinox v Commission* [2001] ECR II-3859, paragraph 55, and Case T-62/02 *Union Pigments v Commission* [2005] ECR II-5057, paragraph 36), that is likely to have an effect on its definitive findings as regards the gravity of that infringement

is not called into question by the fact that the applicant raised a defence of limitation, in respect of which the burden of proof rests, in general, with the applicant.

- 175 Reliance on such a plea necessarily requires that the duration of the infringement and the date on which it came to an end be established. Those circumstances cannot alone provide justification for transferring the burden of proof in this regard to the applicant. First, the duration of the infringement, which requires that the date on which it ended be known, is one of the essential elements of the infringement, which must be proved by the Commission, irrespective of the fact that the disputing of those elements also forms part of the defence of limitation. Second, that conclusion is also justified in light of the fact that the non-limitation of a Commission proceeding under Article 25 of Regulation No 1/2003 constitutes an objective legal criterion, pursuant to the principle of legal certainty (see, to that effect, Joined Cases T-22/02 and T-23/02 *Sumitomo Chemical and Sumika Fine Chemicals v Commission* [2005] ECR II-4065, paragraphs 80 to 82), and, thus, is a condition for the validity of any decision imposing a penalty. The Commission is required to comply with this condition even if the undertaking concerned has raised no defence in this regard (*Peróxidos Orgánicos v Commission*, paragraph 65 above, paragraph 52).

- 176 It must be noted that that apportionment of the burden of proof is likely to vary, however, inasmuch as the evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged (*Peróxidos Orgánicos v Commission*, paragraph 65 above, paragraph 53; see also, to that effect, *Aalborg Portland and Others v Commission*, paragraph 48 above, paragraph 79). Where, as in this case, the Commission has adduced evidence of the existence of an agreement, it is for an undertaking which has taken part in that agreement to adduce evidence that it distanced itself from that agreement, evidence which must demonstrate a clear intention, brought to the notice of the other participating undertakings, to withdraw from that agreement (Case T-168/01 *GlaxoSmithKline Services v Commission* [2006] ECR II-2969, paragraph 86; see also, to that effect, Joined Cases

C-2/01 P and C-3/01 P *BAI and Commission v Bayer* [2004] ECR I-23, paragraph 63, and *Aalborg Portland and Others v Commission*, paragraph 48 above, paragraphs 81 to 84).

- 177 It is in the light of those principles that it must be ascertained whether the Commission correctly established the facts on which it bases its finding that Siemens interrupted its participation in the cartel on 1 September 1999.

(b) The probative value of the evidence on which the Commission bases its finding that Siemens interrupted its participation in the cartel on 1 September 1999

- 178 As a preliminary point, it is important to bear in mind the essential elements of fact on which the Commission based its finding that Siemens interrupted its participation in the cartel on 1 September 1999, as they emerge, in particular, from recitals 186, 295, 296 and 298 of the contested decision.

- 179 First, ABB stated that Siemens had ceased participating in meetings of the cartel from the end of 1999 and Mr M. indicated that Siemens withdrew in September 1999. Second, the document entitled 'Summary of discussions with JJC', found in the premises of the VA Tech Group, contains a reference which the Commission interprets as referring to the departure of Siemens in September 1999. Third, the Commission indicates that Areva, Melco, Fuji and Hitachi/JAEPS confirmed that Siemens' departure occurred in September 1999.

The statements of ABB and Mr M.

¹⁸⁰ In the context of the third ground of complaint in support of the first part of its second plea, Siemens claims that ABB's statements are especially general and contradictory and that the statements were 'developed' to suit the circumstances, to the point where they are devoid of probative value.

¹⁸¹ In that regard, it must be stated that, in its statement of 7 May 2004, ABB stated that 'to the best of [its] knowledge, for a certain period of time Siemens left the cartel.' When the Commission asked him, during his hearing on 23 September 2005, whether he could indicate exactly when Siemens had interrupted its participation in the cartel, Mr M. replied:

'Not exactly. We were in Geneva, but this I remember when Mr Theiss was announcing that, but not 100 %. It was [1999]. Was it autumn or spring, I cannot remember. Is it important?'

¹⁸² Lastly, in its statement of 4 October 2005, ABB stated that, in the meantime, Mr M. had recalled that Siemens had been still present at the cartel meeting in Sydney from 19 to 24 April 1999 and had not left the cartel until at least four to five months after that meeting, therefore in August or September and that it had been announced by Mr. Theiss of Siemens during a working group meeting in Geneva (Switzerland).

183 It must therefore be held that the statements of ABB and Mr M. as to the exact date on which Siemens interrupted its participation in the cartel in 1999 have evolved somewhat over time. However, those statements are, all the same, not contradictory but merely became more and more specific ('around 1999', 'spring or autumn 1999' and lastly 'August or September 1999') as Mr M., who appears to be the main source of information within ABB for facts surrounding the interruption in Siemens' participation in the cartel, remembered increasingly specific details.

184 In particular, it must be stated that, contrary to what Siemens claims, Mr M.'s later recollections, which gave rise to ABB's statement of 4 October 2005, are not inconsistent with his earlier statements on the circumstances which surrounded the interruption in Siemens' participation in the cartel. While he did indicate that following unfavourable market developments in 1997 and 1998, Siemens recommenced aggressive competition on prices, at no point did he indicate that that was already the case in 1998. First, it is conceivable that the decision-making process within Siemens concerning the correct reaction to unfavourable market developments could have taken some time. Second, it is just as conceivable that Siemens, while having decided at the end of 1998 not to continue participating in the cartel and having adopted more aggressive conduct on the market, tried to benefit for as long as possible from the effects of the cartel by delaying its announcement of that decision until September 1999. According to settled case-law, such conduct — if assumed to be established — cannot suffice to prove that interruption, since an undertaking conducting itself in that manner may simply be trying to exploit the cartel for its own benefit (see, to that effect, Case T-327/94 *SCA Holding v Commission* [1998] ECR II-1373, paragraph 142; *Mannesmannröhren-Werke v Commission*, paragraph 54 above, paragraphs 277 and 278; *Union Pigments v Commission*, paragraph 174 above, paragraph 130, and Case T-43/02 *Jungbunzlauer v Commission* [2006] ECR II-3435, paragraph 269).

185 In relation to the calling into question by Siemens of ABB's statement, it must be held that, even if it cannot be ruled out, as stated in paragraph 64 above, that ABB might

have felt inclined to maximise the significance of the infringing conduct of its competitors, that fact does not deprive the statements of ABB and Mr M. of all probative value as regards the interruption by Siemens in its participation in the cartel in 1999. Since ABB refers, in that regard, solely to Mr M.'s recollections, it is, in those circumstances, the credibility of Mr M.'s testimony which determines the credibility of ABB's statements. As has been set out in paragraph 76 above, the fact that there may be some slight inaccuracies in Mr M.'s statements is not such as to affect, generally, the probative value of those statements.

¹⁸⁶ Furthermore, the fourth ground of complaint raised by Siemens in support of the first part of its second plea, according to which Mr M.'s statements are inadmissible as evidence, since it did not have the possibility of hearing or directly questioning that witness, contrary to what is provided for in Article 6(3)(d) of the ECHR, must also be rejected.

¹⁸⁷ According to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the Community judicature ensures (Opinion 2/94 [1996] ECR I-1759, paragraph 33, and Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 14). For that purpose, the Court of Justice and the General Court draw inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance (Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18, and *Kremzow*, paragraph 14). Furthermore, under Article 6(2) EU the Union is to respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

188 It is therefore necessary to examine whether, in the light of those considerations, the Commission failed to observe the rights of the defence, a fundamental principle of the Community legal order (Case 322/81 *Nederlandsche Banden-Industrie-Michelin v Commission* [1983] ECR 3461, paragraph 7), by not offering Siemens the opportunity to question the witness, Mr M, directly.

189 In that regard, according to settled case-law, observance of the rights of the defence requires that the undertakings and associations of undertakings concerned by the Commission's investigation be afforded the opportunity, from the stage of the administrative procedure, to make known their views on the truth and relevance of the facts, objections and circumstances put forward by the Commission (see Case T-314/01 *Avebe v Commission* [2006] ECR II-3085, paragraph 49, and the case-law cited). On the other hand, it does not require that those undertakings are given the opportunity themselves to question, during the administrative procedure, the witnesses heard by the Commission (see, to that effect, *Aalborg Portland and Others v Commission*, paragraph 48 above, paragraph 200).

190 Therefore, Siemens' ground of complaint must be rejected.

191 In conclusion, a high probative value must be attached to the statements of ABB and Mr M. as regards the date on which Siemens interrupted its participation in the cartel in 1999. None the less, in accordance with the principle set out in paragraph 66 above, those statements must be supported by other evidence.

The document entitled ‘Summary of discussions with JJC’

¹⁹² As has already been stated in paragraph 151 above, the probative value of that document must be treated with caution, in particular in relation to the value to attach to the detailed information which it contains. The exact date on which Siemens interrupted its participation in the cartel in 1999 constitutes such detailed information. Moreover, the document is not, as regards its reference to the date of that interruption, devoid of all ambiguity.

¹⁹³ The first line of that document reads as follows:

‘A/Stop 3==>09/99 1==> for a while in 00’

¹⁹⁴ Since, during the creation of the document on 10 June 2003, the number ‘3’ was the code for Siemens within the cartel, the Commission inferred that Siemens had interrupted its participation in the cartel in September 1999. As Siemens correctly points out in the context of its fifth ground of complaint, alleging a lack of clear documentary evidence of its participation in the cartel until September 1999, such an interpretation leads necessarily to the conclusion that ABB, designated by the code 1, interrupted its participation in the cartel during 2000, although it is undisputed that ABB always participated in the cartel. Therefore, either the Commission’s interpretation of that passage of the document is wrong, or the indication ‘1 ==> for a while in 00’ is wrong. If the latter were the case, there would be no reason to attach more credibility to the reference ‘3 ==> 09/99’. In any event, it is necessary to rule out the Commission’s interpretation that the term ‘Stop’ in the first line of the document referred to in paragraph 193 above refers only to ‘3 ==> 09/99’ and not to ‘1 ==> for a while in 00’.

¹⁹⁵ In conclusion, it must be held that the probative value of that document, as regards the date on which Siemens interrupted its participation in the cartel in 1999, is extremely low.

The statements of Areva, Melco, Fuji and Hitachi/JAEPS

— Areva's statements

¹⁹⁶ In relation to the statements of Areva, the Commission refers, in recital 186 of the contested decision, to a document produced by Areva in the context of its application for immunity from fines entitled 'Explanatory note on the functioning of the cartel for the GIS markets'. Under the title 'Background', that document states the following:

'A first cartel existed between the end of 1980 and 1997 when it was interrupted. From 1997 the participants continued to meet, but they did not agree on market sharing or price fixing and the meetings of that cartel ended in September 1999, as Siemens had definitively withdrawn.'

¹⁹⁷ It must first be observed that that information is not unambiguous. As Siemens points out in its sixth ground of complaint, relied on in support of the first part of the second plea, it is possible to interpret it as meaning that the interruption in its participation

in the cartel took place before the month of September 1999, but that the effect of that interruption — namely not attending meetings in the context of the cartel — occurred only in September. However, such an interpretation cannot be upheld. Indeed it must be noted that Areva's assertion that there were no more meetings from September 1999 was, subsequently, shown to be false, as was confirmed, *inter alia*, by the evidence put forward by the Commission in recitals 191 to 197 of the contested decision. While that circumstance does not make one or other of the interpretations of the passage quoted in paragraph 196 above probable, it is, in any event, likely to cast doubt generally on the reliability of Areva's statements. In that regard, the Commission itself, in recitals 290 and 291 of the contested decision, categorised Areva's statements as 'contradictory and ambiguous,' a fact which was relied on, among others, for not granting Areva a reduction in the fine pursuant to the Leniency Notice, as is apparent from recital 531 of the contested decision.

¹⁹⁸ Therefore, a rather low probative value must be attached to Areva's statements.

¹⁹⁹ Second, to the extent that the Commission relies, in recital 285 and footnote 237 of the contested decision, on Areva's reply to the statement of objections, Siemens' argument that that reply cannot be relied on against it must be upheld, since Siemens did not have access to that statement prior to the adoption of the contested decision (see, in that regard, the case-law cited in paragraph 189 above). The Commission confirmed, in its reply to the written questions of the Court before the hearing, that Areva's reply to the statement of objections had not been communicated to Siemens before the contested decision was adopted.

— The statements of Melco

²⁰⁰ In a document of 4 November 2004, produced in the context of its application pursuant to the Leniency Notice, Melco stated:

‘Until September 1999, the Group ran smoothly in line with its objectives. Then in September 1999, Siemens formally announced that it was withdrawing from the Group because the top managers in Siemens had discovered the Group’s activity.’

²⁰¹ Melco therefore explicitly confirmed that Siemens had not announced the interruption of its participation in the cartel until September 1999.

²⁰² In the context of its sixth ground of complaint, in support of the first part of the second plea, Siemens claims that, in recital 292 of the contested decision, the Commission itself classified those statements of Melco as lacking probative value, on account of the fact that they were contradictory and ambiguous. In that regard, it must be held that, during the administrative procedure, Melco submitted two different statements, namely, first, a document of 4 November 2004, produced in the context of its application pursuant to the Leniency Notice, from which comes the passage cited in paragraph 200 above and, second, the reply to the statement of objections of 5 July 2006. It is only in relation to that latter document that the classification of lacking probative value, appearing in recital 292 of the contested decision, applies. Furthermore, such a classification concerns only an isolated aspect of that reply, that is to say, Melco’s allegation that the cartel had totally ended in 1999, after Siemens interrupted its participation in the cartel. The Commission in particular considered that that allegation was merely based on statements of other parties to the procedure, and was not submitted for the purposes of its own defence. By contrast, the contested decision contains no

express assessment of the probative value of the statements made by Melco on 4 November 2004 in the context of its application pursuant to the Leniency Notice.

203 It must be held that the indication of September 1999 as the date on which Siemens interrupted its participation in the cartel, in Melco's statement of 4 November 2004, must benefit from a high level of credibility, since Melco could have had no interest in indicating a date later than the actual date of that interruption. Given that Siemens' departure — and that of Hitachi a few months later — was such as to give more credibility to the 'breakdown of the cartel' which took place, according to Melco, from 1999/2000, Melco actually had an interest in indicating a date earlier than the actual date.

— The statements of Fuji

204 In its reply to the statement of objections of 11 July 2006, Fuji stated:

'When Siemens withdrew from the cartel in September 1999, the GQ Agreement cartel started to break down. As far as Fuji is aware there were no all party meetings after the Sydney meeting.'

205 It has already been stated in paragraph 90 above, contrary to what Siemens claims, that a high level of credibility must be attached to Fuji's statements, although they were made relatively late in the course of the procedure and in close temporal proximity to an application pursuant to the Leniency Notice. Further, in relation to the date on which Siemens interrupted its participation in the cartel, the same considerations

as are valid for Melco are valid for Fuji (see paragraph 203 above): given that that interruption made credible the notion of the ‘breakdown of the cartel’ some time thereafter, a notion also supported by Fuji, it was not in Fuji’s interest to make that date artificially later.

— The statements of Hitachi

²⁰⁶ In recital 186 and in footnote 238 of the contested decision, the Commission refers to Hitachi’s reply to the statement of objections, in which Hitachi confirmed that Siemens interrupted its participation in the cartel in September 1999. However, as Siemens points out, without being challenged by the Commission, that reply cannot be relied on against it, since it did not have access to that reply before the contested decision was adopted (see, in that regard, the case-law cited in paragraph 189 above). Therefore that piece of evidence must be excluded.

Interim conclusion

²⁰⁷ It follows from the foregoing that the Commission could rely on various pieces of evidence to find that Siemens had participated in the cartel until September 1999, including the statements of ABB and Mr M. which were held to be credible and which were confirmed, on that point, by the statements of Areva, Melco and Fuji, of which those of Melco and Fuji benefit from a high level of credibility.

208 In the light of those factors, it must be examined whether the other evidence submitted by Siemens is such as to overturn the Commission's finding and to establish Siemens' claim that it interrupted its participation in the cartel from April 1999.

(c) The evidence submitted by Siemens to establish that it interrupted its participation in the cartel in April 1999

The empirical economic evidence that it interrupted its participation in the cartel at the latest in April 1999

209 In the context of its eighth ground of complaint, relied on in support of the first part of its second plea, Siemens relies on the analysis to substantiate the interruption of its participation in the cartel from April 1999. According to Siemens, the analysis established that, in the period between April and September 1999, it behaved in a competitive manner on the market, as it did after September 1999 and in contrast to how it acted before April 1999.

210 In that regard, reference is made to the considerations set out in paragraphs 135 to 138 above, which are also valid in relation to the issue of Siemens' interruption of its participation in the cartel. On the one hand, as Article 81 EC prohibits not only agreements which have as their effect the distortion of competition, but also those agreements which have that as their object, the Commission is not required to prove the actual effects when finding an infringement. On the other, even assuming that Siemens behaved in a competitive manner during the period from April to September 1999, that fact would not prove that it had distanced itself from the cartel, but only that it had not complied with the agreements. As the Commission correctly point

out, that may just as well be due to the fact that Siemens was attempting to benefit from the cartel.

211 Therefore, that ground of complaint must be rejected.

The testimony of Mr Se.

212 In the context of its seventh ground of complaint, in support of the first part of its second plea, Siemens relied on a statement from Mr Se., employed by Alstom at the time, which stated, in September 2006: 'In April 1999, I understand that it was no longer possible to have a cartel, since Siemens, one of the main players, announced its departure from the cartel'. According to Siemens, the fact that the Commission excluded that statement constitutes an error of law.

213 In that regard, first, it should be noted that, the statement of Mr Se. does not necessarily contradict the Commission's finding that Siemens interrupted its participation in the cartel in September 1999. Mr Se. dated the announcement of Siemens decision to no longer participate in the cartel in April 1999, and not the actual interruption of its participation in the cartel. It is therefore conceivable that, in April 1999, Siemens merely announced its decision and that the interruption in its participation actually only occurred on a later date. For that reason alone, Siemens' argument must be rejected.

214 Second, the Commission did not exclude the testimony of Mr Se. solely on the ground that he gave it 'exclusively under the supervision of Alstom's lawyers', as Siemens claims, but also because it did not consider it credible in itself, since Mr Se. himself was not witness to the facts of which he spoke. As is apparent from recital 289(b) of

the contested decision, it took into account, in particular, the fact that Mr Se. himself accepted that, before April 1999, he was up-to-date on the cartel, but had no information on how the cartel functioned, did not know the identity of the participants, the dates and places of the meetings or the rules which applied. In addition, it is apparent from the table of meetings provided by ABB on 5 October 2005, which has not been challenged by Siemens, that Mr Se. did not take part personally in the Sydney meeting in April 1999, as Alstom was represented by three other employees. Such an assessment of the evidence by the Commission is not mistaken. In any event, it is not for the Court, in the absence of detailed argument from Siemens, to replace the Commission's assessment with its own.

- ²¹⁵ Therefore, the ground of complaint must be rejected in so far as it concerns the testimony of Mr Se.

The testimony of Mr Tr., Mr E. and Mr Sch.

- ²¹⁶ In the context of its seventh ground of complaint, raised in support of the first part of its second plea, Siemens also criticises the Commission for not having taken account of the statements of its former employees, Mr Tr., Mr E., and Mr Sch. which it produced during the administrative procedure.

- ²¹⁷ At the outset it is necessary to reject Siemens' claim that the Commission did not take account of the statements of its former employees. Once Siemens had produced those written statements, by letter of 7 August 2006, the Commission indicated, by letter of 12 December 2006, that it did not consider it necessary to interview those witnesses, since their testimony had not given rise to questions on the Commission's part.

- 218 In addition, the Commission indicated that the statements of former employers were not such as to change its assessment regarding the date on which Siemens interrupted its participation in the cartel, relying on the range of statements and evidence which it had gathered.
- 219 In that regard, it must be stated that the credibility of statements of former employees of Siemens is seriously affected by the fact that those employees dispute that there was any agreement on GIS projects in Europe, even though, as has been set out in the context of the first plea, the Commission has established to the requisite legal standard that the common understanding also related to GIS projects in Europe.
- 220 Moreover, as regards the exact date on which Siemens interrupted its participation in the cartel in 1999, it must be pointed out that Mr Tr., as is apparent from his statement, retired in 1994 and stated that he did not know precisely when Siemens withdrew from the cartel. Mr Sch. indicated that his boss, MR E., had told him, in the course of 1998, that he was going to retire as anticipated in 1999 and that he had also decided that Siemens would give up its participation in the GQ Agreement. However, he did not state when that decision became effective and, in addition, the dates indicated by him were not consistent with those indicated by Mr E. The latter stated that he retired only in the middle of 2000 and decided to withdraw Siemens from the GQ Agreement prior to ('im Vorfeld') the Sydney meeting, of which he informed Mr Sch. asking him to take the necessary steps. It may be that the facts stated by Mr Sch. took place one year after the dates indicated by him. Mr E., furthermore, confirmed that he had informed Mr V., an employee of Alstom, before the Sydney meeting, and the Japanese undertakings 'in close temporal proximity' of that meeting, while admitting that he did not recall if it was before or after that meeting. By contrast, he expressly acknowledged that he had not informed the other undertakings, in particular ABB, and had not referred to Siemens' withdrawal during the annual meeting.

221 In the light of the foregoing, it must be held that that evidence establishes, to the requisite legal standard, that there was no ‘official’ distancing by Siemens at that meeting. In a cartel involving a number of undertakings, a clear and explicit distancing on the part of one of the undertakings must be addressed to all the other participants. There is, therefore, no question of an ‘unacceptable discrimination’ in relation to other similar cases, as Siemens claims.

222 Moreover, Mr E. also stated that it was only after informing the Japanese undertakings that he had informed the secretary to the European cartel of Siemens’ interruption of its participation in the cartel, who then informed the other undertakings on a date unknown to Mr E. It must be borne in mind, in that regard, that, according to Mr Tr.’s statement, at that stage the secretariat was handled on behalf of Siemens by Mr Th. who was also present at the Sydney meeting. Mr E.’s testimony does not therefore contradict the Commission’s findings in that regard. On the contrary, his statement confirms that Siemens did not openly distance itself from the cartel at the Sydney meeting in April 1999 and, in addition, it is also perfectly consistent with Mr M.’s version, according to which he had been informed by Mr Th. at a job meeting in Geneva in September 1999. It must be pointed out, in that regard, that it is clear from Mr E.’s statement that Mr Th. was still carrying out his role of European secretary to the cartel on behalf of Siemens for some time after the Sydney meeting, which alone is sufficient to reject Siemens’ argument that it had interrupted its participation in the cartel in April 1999. According to settled case-law, the fact that an undertaking does not publicly distance itself from an infringement in which it participated or does not report it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery, with the result that such tacit acceptance can constitute complicity or a passive mode of participation in the infringement (*Aalborg Portland and Others v Commission*, paragraph 48 above, paragraph 84).

223 Therefore, far from calling into question the Commission’s finding that Siemens interrupted its participation in the cartel only in September 1999, the testimony of Mr Tr., Mr E. and Mr Sch. rather tend to confirm that finding to a certain extent.

²²⁴ That ground of complaint must therefore be rejected in so far as it concerns the testimony of Mr Tr., Mr E. and Mr Sch. and, therefore, the ground of complaint must be rejected in its entirety.

The lack of evidence of Siemens' participation in an agreement on GIS projects after April 1999

²²⁵ In the context of its first ground of complaint, relied on in support of the first part of the second plea, Siemens claims that, in the contested decision, the Commission does not allege it participated in an agreement on GIS projects after April 1999. According to Siemens, the last of the projects referred to by the Commission in which it participated dated from 8 March 1999 and the information provided by Fuji in its application pursuant to the Leniency Notice does not prove Siemens' participation in projects or information exchange in that regard after March 1999.

²²⁶ It should be pointed out, in that regard, that the lack of evidence of agreements on GIS projects after March 1999 does not mean that such agreements did not exist. As the Commission contends, the global list is not exhaustive. In addition, even if it is proved that Siemens did not participate in an agreement on projects after March 1999, that would not constitute evidence of the interruption of its participation in the cartel. As the Commission points out in its written pleadings, the criticism which is made of Siemens in the contested decision goes well beyond only agreements on actual projects. It suffices to cite, in that regard, the fact that Siemens carried out, during that time, the duties of European secretary to the cartel, a role which facilitated the functioning of the cartel.

227 Therefore, the arguments submitted by Siemens in the context of this ground of complaint are not such as to overturn the Commission's finding, based on the evidence in paragraphs 179 to 207 above, showing that Siemens participated in the cartel until September 1999. That ground of complaint must therefore be rejected.

The lack of evidence of a meeting after 22 April 1999

228 In the context of its second ground of complaint, relied on in support of the first part of its second plea, Siemens claims that the Commission has adduced no evidence that, in 1999, it had participated in a meeting later than the Sydney meeting organised from 19 to 24 April of that year.

229 In that regard, it must be noted that the lack of evidence of a meeting after April 1999 is not such as to undermine the indicia on which the Commission relied to find that Siemens participated in the cartel until September 1999.

230 The fact that the Commission had no knowledge of later meetings does not mean that such meetings did not take place. In particular, by stating, in recital 183 of the contested decision, that '[a]fter the meeting in Sydney of 19-24 April 1999, annual summit meetings were interrupted,' the Commission made clear reference to the annual meetings and therefore did not rule out that there had been other meetings at an operational level after that date. In that regard, it is apparent from Article 3 of the GQ Agreement that the general meeting was to be held once a year. Therefore, even if Siemens had not interrupted its participation in the cartel in the course of 1999, it would not have been possible to expect another meeting of that kind to take place in that same year. On the other hand, Article 5 of the GQ Agreement provides for

the holding of committee meetings every two weeks, in order to exchange mutual points of view on the projects claimed by each group. As is clear from Annex 4 to the GQ Agreement, Siemens (designated by the code '8') was a member of the European Committee and thus had to take part in those meetings. Furthermore, it is apparent from Article 5 of the EQ Agreement that the job meetings, in which all involved members of the cartel had to participate, were held for both projects which had been allocated and for those for which only an agreement on a minimum price had been reached, and it was for the European secretary to the cartel — for Siemens — to send the invitations to those meetings and to chair them. In those circumstances, the mere fact that the Commission has not established the date and place of other meetings in 1999 after Sydney does not allow the conclusion that such meetings did not take place.

231 That ground of complaint must therefore be rejected.

232 In the light of all of the foregoing, it must be held that the Commission had sufficient evidence available to it to justify finding that Siemens had participated in the cartel until September 1999. Furthermore, Siemens did not give a convincing alternative explanation for the existence of that evidence, in accordance with the requirements laid down in the case-law. Taking account of the factual elements referred to in paragraph 207 above, relied on by the Commission to establish Siemens' participation until September 1999, it was for Siemens to provide an explanation or alternative justification capable of undermining the Commission's findings for which it bore the burden of proof (see, to that effect, *Aalborg Portland and Others v Commission*, paragraph 48 above, paragraph 79, and *Peróxidos Orgánicos v Commission*, paragraph 65 above, paragraph 71).

233 Therefore, the first part of the second plea must be rejected

B — *The second part of the second plea, based on the rules on limitation of actions*

1. Arguments of the parties

²³⁴ In relation to the first phase of its participation in the infringement in respect of which it is criticised and which ended on 22 April 1999, Siemens claims that the limitation period ended on 22 April 2004 and thus prior to the inspections which took place on 11 and 12 May 2004. According to it, the Commission's argument that it participated, on two occasions, in the same single and continuous infringement cannot allow the rules on limitation to be ignored. The cartel which existed from 1988 to 1999 was clearly different from that which existed between 2002 and 2004.

²³⁵ The Commission disputes the arguments put forward by Siemens.

2. Findings of the Court

²³⁶ Article 25(1)(b) of Regulation No 1/2003 sets a limitation period of five years for infringements of the kind alleged against Siemens. Pursuant to the second sentence of Article 25(2), in the case of continuing or repeated infringements, time is to begin to run on the day on which the infringement ceases. Under the first sentence of Article 25(3) of that regulation, any action taken by the Commission for the purpose of

the investigation or proceedings in respect of an infringement interrupts the limitation period.

²³⁷ In the present case, the plea that the action is time barred, which is raised in relation to the first phase of Siemens' alleged infringement, presupposes, therefore, that two cumulative conditions are met. First, the first phase must have ended at the latest on 10 May 1999, that is to say, five years before the day preceding the on-site inspections which the Commission carried out on 11 and 12 May 2004. Second, the two phases of the infringement alleged against Siemens cannot have formed part of a single and continuous infringement, within the meaning of Article 25(2) of Regulation No 1/2003, since, in such a situation, the limitation period starts to run only on the day when the second of those phases ended in 2004.

²³⁸ Suffice it to recall, in that respect, as has been set out in paragraph 232 above, that the Commission correctly stated, in the contested decision, that the first phase of Siemens' participation in the infringement ended only in September 1999 and therefore after 10 May 1999.

²³⁹ Therefore, the plea that the action is time barred which is the subject-matter of the second part of the second plea must be rejected.

²⁴⁰ In any event, the second condition laid down in paragraph 237 above is also not met. The Commission correctly stated that the cartel in which Siemens participated from 2002 was, in essence, the same cartel in which it participated until 1999.

241 In that regard, a number of criteria have been identified in the case-law as relevant for assessing the single nature of the infringement, namely the fact that the objectives of the practices at issue were identical or different (Case T-21/99 *Dansk Røhrindustri v Commission* [2002] ECR II-1681, paragraph 67; see, also, to that effect, Case C-113/04 P *Technische Unie v Commission* [2006] ECR I-8831, paragraphs 170 and 171, and *Jungbunzlauer v Commission*, paragraph 184 above, paragraph 312), the identical nature of the relevant goods or services (see, to that effect, judgment of 15 June 2005 in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others v Commission*, not published in the ECR, paragraph 118, 119 and 124, and *Jungbunzlauer v Commission*, paragraph 184 above, paragraph 312), the fact that the undertakings which took part were identical (*Jungbunzlauer v Commission*, paragraph 184 above, paragraph 312), and the identical nature of the means of implementing the cartel (*Dansk Røhrindustri v Commission*, paragraph 68). The fact that the physical persons involved on behalf of the undertakings are identical and that the geographical scope of the practices at issue is identical are other relevant criteria.

242 In the present case, all of the criteria referred to in paragraph 241 allow the finding that the cartel in which Siemens participated from 2002 was, in essence, the same as the one in which it had participated until 1999.

243 First, the objective of stabilising the market shares of the members of the cartel, of sharing world markets between the Japanese and European producers — inter alia, by reserving European markets for European producers — and of avoiding price erosion, was the same throughout the two periods at issue. In that regard, the arguments raised by Siemens, that the two phases of its participation in the infringement were entirely different from each other, must be rejected.

244 As a starting point, it is not true that the cartel applied to European projects only from 2002. On the contrary, as is apparent from the findings in paragraph 161 above, the Commission has established to the requisite legal standard that the cartel applied to GIS projects within the EEA from the outset.

²⁴⁵ Next, it is insignificant whether the GQ Agreement was cancelled and replaced by another agreement, as Siemens alleges, relying on Hitachi's statements, or was simply amended, as long as the objective of the practices at issue remained the same.

²⁴⁶ Lastly, the concept of 'common objective' implicitly defended by Siemens must be rejected. Under that concept, the finding of the existence of a single infringement depends not only on objective criteria, such as those referred to in paragraph 241 above, but assumes also the existence of a subjective element in the form of an overall common intention, which is lacking in the present case. It must be noted, in that regard, that Siemens' proposition finds no support in the case-law in paragraph 241 above, which does not refer to a subjective criterion in relation to the assessment of the single nature of the infringement. Therefore, the issue whether all of the agreements and practices contrary to Article 81 EC constitutes a single and continuous infringement is, on the contrary, an issue which depends solely on objective factors, including the common objective of those agreements and practices. That latter criterion is one which must be assessed in the light only of the content of those agreements and practices, which must not be confused, as Siemens seem to have done, with the subjective intention of the various undertakings to participate in a single and continuous infringement. By contrast, that subjective intention can and must be taken into account only in the context of assessing individual participation of an undertaking in a single and continuous infringement (see paragraph 253 below).

²⁴⁷ Second, the operating methods of the cartel remained on the whole unchanged, even if they progressively evolved over the years, in particular in accordance with the reduction in the number of participating undertakings following the mergers within the sector and the technical evolution of means of communication. However, as the Commission set out in recital 280 of the contested decision, those changes did not occur at one precise moment between 1999 and 2002, but incrementally. Moreover, they did not affect the essential principles of the method of operation, namely the sharing of GIS projects among the cartel members on the basis of quotas fixed by

them, the manipulation of bids, and the setting of minimum prices for GIS projects that had not been allocated.

248 Third, during the two periods at issue, the cartel was aimed at the same market, namely that in GIS projects in the form of loose equipment or turnkey power sub-stations.

249 Fourth, the undertakings which participated in the cartel, in essence, remained the same throughout the cartel from 1988 to 2004, regard being had to the merger process within the GIS sector which took place during that period and with the sole exception of the temporary absence of Siemens, the VA Tech undertaking and Hitachi.

250 Fifth, the individuals representing the various undertakings within the cartel were, to a very large extent, the same in 1999 and 2002, leaving aside a certain fluctuation which is normal within each undertaking. The continuity of the individual representatives is proved by the various meeting lists which form part of the case-file and, in particular, those appearing in Annex 1 to the contested decision, and by the list of those individuals from the undertakings involved in the cartel appearing in Annex II to the contested decision.

251 Sixth, the geographical scope of the cartel was the same in 1999 and during the period from 2002 to 2004. It had increased slightly since 1988 on account of the fact that the markets of Central and Eastern Europe had, in the meantime, become accessible to the cartel members.

252 Seventh, as pointed out by the Commission and not challenged by Siemens, the fact that other members continued the cartel, without those undertakings which were temporarily absent, and that the objective continuity of a single and continuous infringement was thus maintained, also shows that it was one and the same infringement. In that regard, the Court must reject Siemens' argument that, by taking that aspect into account, the Commission is penalising it for the fault of others. There is no question of holding Siemens liable for the period between September 1999 and March 2002, but rather of holding the single nature of the infringement, which continued in its absence, against it. As stated in the previous paragraph, Siemens was aware, or should have been, of the fact that from 2002 it was participating in the same infringement as that in which it had participated until 1999.

253 Finally, in relation to the subjective aspect, it is sufficient that, when Siemens recommenced participation in the cartel, it was aware that it was participating in the same cartel as before. For the single nature of that infringement to be held against it, it would even suffice that Siemens was aware of the essential criteria, referred to in paragraph 241 above, which justify finding a single infringement, even if it did not itself infer its existence from them. In the light of the fact that its employees, Mr S. and Mr Ze. participated, on its behalf, in the cartel both before its withdrawal in 1999 and after its return in 2002, Siemens could not be unaware of the fact that the factors determining the single nature of the infringement were the same, and in particular that it concerned the same objectives, goods, geographical markets and participating undertakings.

254 Therefore, the plea that the action was time barred raised by Siemens must, on any reading, be rejected on account of the fact that the two phases of the infringement in which it is alleged to have participated were part of the same single and continuous infringement.

255 In conclusion, the Court must reject the second part of the second plea alleging that the action in respect of the first phase of the Siemens' alleged infringement was time barred.

C — The third part of the second plea, alleging no participation in the cartel after 1 January 2004

1. Arguments of the parties

256 Siemens claims that the Commission wrongly found, in the contested decision, that the infringement definitively ceased on 11 May 2004, although no actual repercussions had been noted in the common market after January 2004, since the last relevant meeting had been held on 21 January 2004 and had not led to any agreement on price. Therefore, the cartel no longer had any effects on the market from January 2004 and the Commission, in addition, did not adduce evidence of such effects.

257 The Commission disputes the arguments put forward by Siemens

2. Findings of the Court

258 This part of the second plea must be rejected for two reasons

259 First, as was recalled in paragraph 135 above, according to settled case-law, it follows from the actual wording of Article 81(1) EC that agreements between undertakings are prohibited, regardless of their effect, where they have an anti-competitive object (see *Commission v Anic Partecipazioni*, paragraph 43 above, paragraph 123, and *JFE Engineering and Others v Commission*, paragraph 49 above, paragraph 181). Consequently, it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is proved (see *Volkswagen v Commission*, paragraph 135 above, paragraph 178, and the case-law cited). It has also been pointed out, in paragraph 134 above, that, in the present case, the Commission relied mainly on the object of the agreement sanctioned under Article 1 of the contested decision, which was to restrict competition. It first found, in recitals 303 and 304 of the contested decision, that the complex of agreements and/or concerted practices described had as its object the restriction of competition within the meaning of Article 81 EC and Article 53 of the EEA Agreement and, that, in those circumstances, it was not necessary for the purposes of applying those provisions to show the actual anti-competitive effects of an agreement, before adding, in recital 308 of the contested decision, that, by its very nature, the implementation of a cartel agreement of the type described above leads to a significant distortion of competition.

260 Therefore, as the Commission was correct to point out, Case T-279/02 *Degussa v Commission* [2006] ECR II-897, paragraphs 236 and 240, does not support Siemens' argument. The passages of that judgment raised by Siemens do not relate to the finding of an infringement or its duration, but only to the assessment of its gravity. Moreover, the Commission, in that case, expressly relied on the effect which the cartel had had on the prices of the goods at issue. As was observed in the preceding paragraph, that was specifically not the situation in the present case.

261 Therefore, Siemens' arguments seeking to substantiate the absence of further repercussions, due to the cartel, after 1 January 2004 are irrelevant.

262 Second, as the Commission indicated in recital 215 of the contested decision, on the basis of the statements of the VA Tech Group and without challenge by Siemens, the communications and meetings between the members which remained in the cartel after the departure of ABB concerned, in particular, information exchange regarding the tenders already underway, the position of parties external to the cartel, the preservation or interruption of contacts and issues of security. Those issues for discussion show that, even if the members which remained in the cartel did not manage to agree on specific projects, they had the intention to continue the cartel or, at the very least, had not taken a decision to bring it to an end.

263 That interpretation of the facts is not called into question, contrary to what Siemens claims, by a statement from Hitachi regarding the end of the cartel. That statement was made in the form of a table indicating, for various meetings in the context of the cartel, the date, the place, the participants, a brief outline of the subject-matter and the source of the information from among the employees of Hitachi. First, it must be stated, in that regard, that the indications on the subject-matter of the various meetings are only very brief and sometimes general. For example, for the meetings of 17 March and 8 April 2004, it is noted, respectively, that ‘the aim of the meeting was to exchange information’ and that ‘[the job meeting] included a general discussion of the market’. Those indications do not clearly reveal the precise subject-matter of the discussions and in no way exclude that possibility that there was information exchange and discussions constituting an infringement of Article 81(1) EC and Article 53 of the EEA Agreement.

264 In addition, it must be observed that the extracts from Hitachi’s statement produced by Siemens comprise pages 7278, 7280 and 7281 of the file for the proceeding before the Commission, but not page 7279, which may contain indications on other meetings which took place between January and March 2004. Irrespective of the issue of their credibility and their probative value, those documents do not fully explain Hitachi’s statements regarding the meetings of 2004, in relation to which Siemens

claims that they gave rise to no new repercussions due to the cartel. Therefore, it must be held that Siemens has not proved that claim.

²⁶⁵ It follows that the Court must reject the third part of the second plea, alleging no new repercussions due to the cartel from January 2004.

²⁶⁶ Therefore, the second plea must be rejected in its entirety.

III — *The third plea, alleging error of law in calculating the amount of the fine*

²⁶⁷ Siemens' third plea is divided into six parts. In the first part, Siemens claims that the basic amount of the fine is disproportionate. The second part of the plea is based on the alleged disproportionate nature of the deterrent multiplier. In the context of the third part, Siemens claims that the Commission based its calculation on an incorrect duration of the infringement. In the fourth part, it claims that the Commission should have granted it a reduction in the amount of the fine pursuant to the Leniency Notice. The sixth part alleges that the 'Competition' Directorate General (DG) in fact constrained the College of Commissioners.

A — The first part of the third plea, based on the disproportionate nature of the basic amount of the fine

²⁶⁸ In the context of the first part of the third plea, Siemens claims, in essence, that the basic amount of the fine which was imposed on it is disproportionate with regard to the gravity of the infringement and its economic effects, and has not been properly reasoned. According to Siemens, the Commission ought not to have classified the infringement as ‘very serious’ and, accordingly, ought to have set the basic amount of the fine well below EUR 10 million. In that regard, it raises three grounds of complaint alleging, first, that the Commission has not proved the effects of the cartel, second, that the basic amount of the fine is disproportionate with regard to the economic significance of the cartel and, third, that the cartel was wrongly classified.

1. The first ground of complaint, alleging failure to prove the effects of the cartel.

(a) Arguments of the parties

²⁶⁹ Siemens challenges the Commission’s findings in recitals 477 and 484 of the contested decision, regarding the effects of the cartel, alleging that they are contradictory, imprecise and wrong. According to Siemens, as the Commission acknowledged correctly that the cartel had no quantifiable effect, it could not thereafter refer, when determining the basic amount, to the alleged effects of the cartel. Furthermore, the Commission has submitted no concrete and credible evidence showing that the cartel had an impact on the market and the analysis even demonstrates that there were

no such effects. The Commission's assertion that long-term participation in a costly system shows that the cartel was profitable for its members and accordingly had an impact was based on mere conjecture and not on objective economic factors.

270 The Commission disputes the arguments put forward by Siemens.

(b) Findings of the Court

271 At the outset, it must be recalled that, under the first paragraph of Section 1A of the Commission Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3; 'the Guidelines'), in calculating the fine with regard to the gravity of the infringement, the Commission must take account of the 'actual impact [of the infringement] on the market, where this can be measured'.

272 First, it must be stated, in that regard, that, contrary to what Siemens alleges, nowhere in the contested decision did the Commission acknowledge that the cartel had had no quantifiable impact. The Commission stated, in recital 477 of the contested decision, that, due to the absence of information on likely prices of GIS projects in the EEA in the absence of the cartel, it was not possible to measure its actual impact on the market and that, accordingly, it had not relied specifically on a particular impact when determining the gravity of the infringement, pursuant to Section 1A of the Guidelines.

273 It was only for the sake of completeness that the Commission indicated that, in the present case, there were concrete and credible indications from which it could reasonably be inferred that the cartel had had an actual impact on the market, given that the cartel was effectively implemented, that it lasted for more than 16 years and that the participants were willing to incur substantial costs to maintain its existence. That finding cannot be understood as contradicting the finding that it was impossible to measure that impact. It is quite clearly intended only to explain that the Commission considered that the cartel had had an impact, even if that impact could not actually be measured and therefore could not be taken into account in determining the gravity of the cartel.

274 Second, contrary to what Siemens claims, it does not follow from recital 484 of the contested decision that the Commission referred to the effects of the cartel when determining the gravity of the infringement. The form of words ‘given the circumstances described in section 8.3.1 above’ (the section under which recital 477 of the contested decision has been inserted) must be understood as referring, *inter alia*, to the Commission’s finding that the cartel’s effects were not quantifiable.

275 Consequently, it is not necessary to assess whether the existence of the cartel’s impact on the market could be presumed on the basis of the evidence relied on by the Commission.

276 Therefore, the first ground of complaint raised by Siemens must be rejected.

2. The second ground of complaint, based on the disproportionate nature of the basic amount of the fine in relation to the economic significance of the infringement

(a) Arguments of the parties

²⁷⁷ Siemens claims that the basic amount of the fine is disproportionate in relation to the value of the market for the product in question and in relation to its own share of the market. By setting the basic amount at EUR 45 million, the Commission departed from its earlier decision-making practice, although it is required to follow a consistent and non-discriminatory decision-making practice. According to Siemens, that amount should be much less than EUR 35 million. It therefore calls on the Court to substantially reduce the basic amount of the fine, in the context of its powers of unlimited jurisdiction.

²⁷⁸ The Commission disputes Siemens' arguments.

(b) Findings of the Court

²⁷⁹ The fourth and sixth paragraphs of Section 1A of the Guidelines provide that the effective economic capacity of offenders to cause significant damage to other operators must be taken into account, as must the specific weight of the offending conduct of each undertaking on competition, particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type. On the other hand, the Guidelines do not provide that the effective economic capacity of undertakings or the specific weight of their conduct must be assessed in the

light of a particular criterion, such as their market share as regards the product in question within the EEA or the common market. Therefore, the Commission is free to apply, in that regard, a criterion which is suitable in the light of the circumstances of each particular case.

280 In the present case, after having found, in recital 479 of the contested decision, that the infringement had to be regarded as ‘very serious’ within the meaning of the Guidelines, the Commission explained, in recitals 480 to 490 of the contested decision, its nuanced treatment of the various undertakings, depending on the world market shares held by them, reflecting their respective economic capacities to cause significant damage to competition.

281 The Commission explained, in recital 481 of the contested decision, *inter alia*, that, given the global character of the cartel arrangements, the worldwide sales figures give the most appropriate picture of the participating undertakings’ capacity to cause significant damage to other operators in the EEA and their contribution to the effectiveness of the cartel as a whole or, conversely, of the instability which would have affected the cartel if a particular undertaking had not participated in it. In particular, the Commission stressed the fact that the role of the Japanese undertakings would be substantially underestimated if it were to rely on turnover data pertaining only to the EEA, given that, pursuant to the agreements underpinning the cartel, those undertakings to a large extent refrained from activities on the European markets.

282 Lastly, the Commission indicated that, in respect of Siemens and ABB, which each held between 23 and 29 % of worldwide turnover of GIS projects, the basic amount of the fine had to be set, on the basis of the value of the market in the EEA, at EUR 45 million.

283 Therefore, in setting the basic amount of the fine, the Commission, without any manifest error of assessment, took account of both the worldwide turnover for GIS projects and the value of the market in the EEA. The first of those criteria served, in accordance with recitals 480 and 481 of the contested decision, served to split the undertakings into a number of categories. In particular, the application of those criteria takes adequate account of the circumstances of the present case, notably of the fact that the cartel participants agreed on the sharing of European and Japanese markets between the respective groups of producers. The level of fine resulting from such an exercise cannot be classified as disproportionate.

284 By contrast, the arguments raised by Siemens carry no conviction.

285 In the first place, the Court must reject Siemens' argument that, in Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Røhrindustri and Others v Commission* [2005] ECR I-5425, paragraph 242, the Court held that 'the profit which [the undertakings] were able to derive from those practices ... and the value of the goods concerned' constitute essential factors in calculating the amount of the fine.

286 In that regard, it must be stated that that incomplete citation does not properly reflect the content of paragraph 242 of *Dansk Røhrindustri and Others v Commission*, paragraph 285 above, which cannot moreover be fully understood without its context. Paragraphs 241 to 243 of that judgment state as follows:

'241 The gravity of the infringements must be assessed in the light of numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, although no binding or exhaustive list of the criteria to be applied has been drawn up ...

242 The factors capable of affecting the assessment of the gravity of the infringements include the conduct of each of the undertakings, the role played by each of them in the establishment of the concerted practices, the profit which they were able to derive from those practices, their size, the value of the goods concerned and the threat that infringements of that type pose to the objectives of the Community ...

243 It follows that, on the one hand, it is permissible, for the purpose of fixing the fine, to have regard both to the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed, which gives an indication of the scale of the infringement. On the other hand, it follows that it is important not to confer on one or the other of those figures an importance disproportionate in relation to the other factors and, consequently, that the fixing of an appropriate fine cannot be the result of a simple calculation based on the total turnover. That is particularly the case where the goods concerned account for only a small part of that figure ...'

287 First, it follows from paragraph 241 of that case that the list of factors which are likely to be involved in the assessment of the gravity of an infringement, appearing in paragraph 242 of that case, is neither binding nor exhaustive. Therefore, the Commission is free to take other factors into account, or to attach less weight to one of the factors set out in paragraph 242, or even not take account of it at all, if that seems appropriate to it in the light of the circumstances of a particular case. Such an interpretation is also confirmed by paragraph 243 of that case. Siemens cannot thus rely on paragraph 242 of that case to claim that the basic amount of the fine should be determined in proportion to the size of the market for GIS projects within the EEA.

288 Second, it is clear from the first sentence in paragraph 243 of *Dansk Røhrindustri and Others v Commission*, paragraph 285 above, that the notion of ‘value of the goods concerned’, used in paragraph 242 of the judgment in that case, must be understood as a measure indicating the share of the worldwide turnover of the undertakings in question which comes from the goods which are the subject-matter of the cartel and not as referring to the size of the market for those goods within the EEA. Therefore, on that last point, contrary to what Siemens claims, the Court of Justice expresses no view on taking account of the value of the relevant market within the EEA.

289 In the second place, as the Commission correctly states, neither the Guidelines nor Community law in general provide that fines imposed by the Commission must necessarily be proportionate to the value of the market for the goods concerned. By contrast, the Guidelines expressly provide, in relation to the assessment of the gravity of the infringement, that account should be taken of other factors, inter alia, the effective economic capacity of undertakings, the deterrent effect of the fine, the size of the undertakings in question and the specific weight of different undertakings within the cartel, criteria which were applied by the Commission in recitals 480 and 481 of the contested decision.

290 In the third place, it must be recalled that the Commission’s earlier decision-making practice does not serve as a legal framework for fines in competition matters (*LR AF 1998 v Commission*, paragraph 87, above 234). In the context of Regulation No 1/2003, the Commission possesses a wide margin of discretion when setting fines, in order that it may direct the conduct of undertakings towards compliance with the competition rules. Therefore, the fact that the Commission may have applied fines of a certain level in the past to certain types of infringement does not mean that it is stopped from raising that level, within the limits set out in Regulation No 1/2003, if that is necessary in order to ensure the implementation of Community competition policy. The proper application of Community competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy (see, by analogy, *Dansk*

Røhrindustri and Others v Commission, paragraph 285 above, paragraph 227, and *Groupe Danone v Commission*, paragraph 66 above, paragraph 395).

291 It follows that undertakings involved in an administrative procedure in which fines may be imposed cannot acquire a legitimate expectation from the fact that the Commission will not exceed the level of fines previously imposed. Consequently, the undertakings in question must take account of the possibility that the Commission may decide at any time to raise the level of the fines in relation to that applied in the past (*Dansk Røhrindustri and Others v Commission*, paragraph 285 above, paragraphs 228 and 229).

292 It follows that the examples of decisions cited by Siemens cannot — in the light of the principle that penalties must be lawful, enshrined in Article 7(1) of the ECHR — cast doubt on the lawfulness of the basic amount of the fine set in the present case, even if it was, as Siemens claims, higher than amounts set in other cases concerning markets with greater value than that of the market at issue.

293 Therefore, the second ground of complaint raised by Siemens must be rejected.

3. The third ground of complaint, alleging that Siemens was included in the wrong category

(a) Arguments of the parties

294 First, Siemens claims that, in calculating the amount of the fine to be imposed on Siemens, the Commission ought to have taken account of its turnover in 2001, as it did

for Fuji, Hitachi, Melco and Toshiba, and not its turnover for 2003, as it did for ABB, Alstom, Areva and the VA Tech Group. The Commission thus did not apply its own method for calculating fines in a correct, consistent and non-discriminatory manner. Second, Siemens considers that it ought not to have been classified in the same category as ABB, since its turnover, in 2001 and 2003, was much lower than that of ABB, as certain documents in the case-file show. Moreover, Siemens points to inconsistencies as regards the value of the world market for GIS projects in 2001 and 2003 and claims that the Commission should have precisely stated each participant's share in the cartel's global turnover for those two years, and the turnover which they obtained from GIS projects.

²⁹⁵ The Commission disputes Siemens' arguments.

(b) Findings of the Court

²⁹⁶ First, it is necessary to distinguish between two different aspects which are challenged by Siemens. On the one hand, it claims that the Commission ought to have chosen 2001 as its reference year for determining Siemens' market share. On the other, it claims that, in the light of its allegedly smaller market share than ABB, it should not have been classified in the first category of undertakings with ABB, rather in the second category.

²⁹⁷ As regards, first, the choice of the reference year for establishing the relative weight of undertakings, it must be pointed out that, although the Guidelines provide, in the fourth and fifth paragraphs of Section 1A, for different treatment for undertakings depending on their economic significance, they do not state in relation to which year

the relative weight of the undertakings must be established. In that regard, the second paragraph of Section 5(a) of the Guidelines, which provides for account to be taken of the accounting year for the year preceding the year in which the decision is taken, applies only to the determination of turnover for the purpose of compliance with the 10% limit, pursuant to the second subparagraph of Article 23(2) of Regulation No 1/2003, and is not therefore applicable for the purposes of determining the relative weight of undertakings in the cartel.

298 In the present case, 2003, which was chosen by the Commission as the reference year for establishing the relative weight of Siemens and the other European undertakings, was the last complete year of activity by the cartel. Such a choice seems appropriate for determining the relative weight of those undertakings in the cartel.

299 The fact that the Commission chose 2001 as the reference year for establishing the relative weight of the Japanese undertakings was explained, in recital 482 of the contested decision, by specific circumstances peculiar to the Japanese producers, in particular the fact that, on account of the restructuring of their GIS activities in two common undertakings, the Commission did not have separate turnover figures for those undertakings. It is not necessary, for the purposes of the present case, to assess the lawfulness of the treatment of the Japanese producers. Even if that treatment had been unlawful, it would be necessary, in such a situation, to amend the contested decision in relation to the Japanese producers and not in relation to Siemens.

300 Second, regarding Siemens' allegedly smaller market share vis-à-vis ABB, the Commission, as it indicated in recital 483 of the contested decision, relied on figures provided by the undertakings themselves. In its reply of 5 July 2005 to a request for information from the Commission, Siemens indicated, for 2003, a total worldwide turnover in relation to GIS of EUR 658.9 million. In addition, according to its own estimates, the world GIS market had, in 2003, a value of EUR 2 305.5 million, which

places it on the same level as that referred to in the Commission's estimations, which state, in footnote 444 of the contested decision, an amount of EUR 2 200 million for 2003 and, in recital 4 of the contested decision, a range of EUR 1 700 million and 2 300 million for 2001 to 2003. Contrary to Siemens' contentions, there are no inconsistencies between those figures.

³⁰¹ By calculating Siemens market share on the basis of figures for 2003 which Siemens itself provided, that is to say a total market value of 2 305.5 million and Siemens' turnover of 658.9 million, a market share of about 28.59 % results for that undertaking in 2003, a figure which places it at the upper limit of the range of 23 to 29 % indicated by the Commission for the first group of undertakings.

³⁰² Siemens cannot successfully challenge that figure, calculated on the basis of its own data, by relying on internal documents from Alstom and ABB who refer to different market share for Siemens.

³⁰³ In addition, the figures in those documents concern parameters other than those taken into consideration by the Commission. In relation, first, to the document from ABB produced as an annex to the application — leaving aside the fact that it relates to 2002 and not 2003 — it is entitled 'Substations Competitor Overview' and therefore concerns only the situation on the market for GIS substations and not the market for GIS projects in general. As regards, second, the document from Alstom appearing in the annex to the application — leaving aside the fact that it relates to 2001 and 2002 — it contains not only a list of undertakings which took part in the cartel but it also refers to other companies (Others), the market share for which is 33.8 %.

As is apparent from footnote 444 of the contested decision, the Commission made its calculations on the basis only of the turnover obtained by the members of the cartel, since the sales made by other producers did not affect the relative ranking of the undertakings in the present case.

304 Therefore, the criticisms made by Siemens relating to the calculation of its market share by the Commission must be rejected and it is not necessary to ask the Commission to produce the turnover for other undertakings which participated in the cartel, as Siemens requests.

305 It follows that the third ground of complaint raised by Siemens must be rejected as must, accordingly, the first part of the third plea in its entirety.

B — The second part of the third plea, based on the disproportionate nature of the deterrent multiplier

1. Arguments of the parties

306 Siemens claims that the deterrent factor of 2.5, applied by the Commission to increase the basic amount of its fine, is excessive and disproportionate in relation to that applied to ABB and constitutes a breach of the principle of equal treatment. Since the Commission chose, in the present case, a method exclusively proportional to the

turnover of the undertakings concerned to determine the deterrent multiplier, the increase imposed on Siemens could at most have been four times higher than that imposed on ABB, as Siemens' total turnover was only four times greater than that of ABB. Accordingly, Siemens calls on the Court to reduce the amount of the fine which was imposed on it. Moreover, it claims there was a lack of reasoning, as the Commission did not explain its method of calculation in the contested decision.

307 In the context of its reply to the written questions of the Court before the hearing, Siemens stated that it was necessary to reduce the deterrent multiplier by 1 as a neutral part of the multiplication. Therefore, the deterrent multiplier applied to Siemens ($2.5 - 1 = 1.5$) is actually six times greater than that applied to ABB ($1.25 - 1 = 0.25$) and not two times higher.

308 The Commission disputes that it infringed the method which it chose to determine the respective deterrent multipliers. It states that the chosen deterrent multiplier is directly proportional to the turnover of the various undertakings concerned. In fact, Siemens coefficient is even degressive in relation to that applied to ABB. As regards, lastly, the duty to state reasons, that duty is limited with regard to the deterrent multiplier. In addition, the figures speak for themselves.

309 In reply to a question from the Court at the hearing, the Commission explained that it proceeded in three stages. First, the turnovers of the undertakings concerned were divided by ten. Second, the root of those figures was obtained. Third, the figures obtained were subject to a rounding down, which lead to the deterrent multipliers actually applied to the various undertakings concerned and, in particular, to the 2.5 multiplier applied to Siemens. In addition, the Commission stated it was not required

to explain its method in detail in the decision and that, in any event, a multiplier of 2.5 is not unusual with regard to its earlier decision-making practice.

2. Findings of the Court

³¹⁰ In the first place, in relation to the ground of complaint based on insufficient reasoning, inasmuch as the Commission did not explain the method for calculating the deterrent multipliers, it should be recalled that the statement of reasons required under Article 253 EC must disclose in a clear and unequivocal fashion the reasoning followed by the institution responsible for the measure, in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63).

³¹¹ It should be noted, in that regard, that while it is true that the contested decision does not indicate the method adopted by the Commission in arriving at the precise level of the multipliers, it is apparent from the case-law that the essential procedural requirement to state reasons is satisfied where the Commission sets out in its decision the factors which enabled it to measure the gravity and duration of the infringement

and it is not required to set out a more detailed account or the figures relating to the method of calculating the fine (Case C-279/98 P *Cascades v Commission* [2000] ECR I-9693, paragraphs 39 to 47; Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-8375, paragraphs 463 and 464, and Case T-15/02 *BASF v Commission* [2006] ECR II-497, paragraph 213).

- ³¹² In particular, it has been held that that it is desirable, but not a requirement of the obligation to state reasons, that the Commission indicate the figures which influenced the exercise of its discretion when setting the fines, especially in regard to the desired deterrent effect (*Cascades v Commission*, paragraph 311 above, paragraph 47 and 48, and *BASF v Commission*, paragraph 311 above, paragraph 214).

- ³¹³ In the present case, the Commission stated, in recital 491 of the contested decision:

‘... [t]he scale of likely fines also makes it possible to set the fines at a level which ensures that they have sufficient deterrent effect, taking into account the size of each undertaking to be fined and the particular circumstances of the case. It is considered that for the undertakings that have a particularly large turnover compared to other players a multiplier is warranted to ensure sufficient deterrent effect.’

314 The Commission then indicated, for each of the undertakings concerned, worldwide turnover in 2005 and the multiplier applied, information which it reproduced in a table. ABB, with a worldwide turnover of EUR 18 038 million in 2005 had a multiplier of 1.25 applied. Melco, with a worldwide turnover of EUR 26 336 million in 2005 had a multiplier of 1.5 applied. Toshiba, with a worldwide turnover of EUR 46 353 million in 2005 had a multiplier of 2 applied. Hitachi, with a worldwide turnover of EUR 69 161 million in 2005 had a multiplier of 2.5 applied. Lastly, Siemens, with a worldwide turnover of EUR 75 445 million in 2005 had a multiplier of 2.5 applied.

315 It is thus apparent from recital 491 of the contested decision that the Commission took the view that an increase to the starting amounts set for Siemens was required in order to ensure sufficient deterrent effect, in the light of its global resources. It is also apparent that the Commission relied, in that respect, on the worldwide turnover figure in 2005.

316 In that regard, it is necessary to bear in mind the settled case-law according to which worldwide turnover gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power (Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others v Commission* [1983] ECR 1825, paragraph 121; *Baustahlgewebe v Commission*, paragraph 43 above, paragraph 139, and *BASF v Commission*, paragraph 311 above, paragraph 212).

317 It is thus apparent that, in the contested decision, the Commission set out, to the requisite legal standard, the elements of law taken into account for increasing the basic amount of the fines in order that they have a deterrent effect, thus allowing Siemens to know the justification for that increase to the basic amount of its fine and to exercise its rights, and placing the court in a position to carry out its review. On the other hand, in the light of the case-law cited in paragraph 312 above, the Commission was not required, in the contested decision, to provide the figure-based explanations

which it gave at the hearing, as they do not form part of the subject-matter of the requirements arising from the duty to state reasons.

318 Therefore, the ground of complaint alleging insufficient reasoning must be rejected.

319 In the second place, Siemens' allegation that the Commission, when calculating the deterrent multipliers, did not faithfully follow its own method based on ABB's turnover and the deterrent multiplier as the 'starting point', must be rejected. That argument is based on confusing the deterrent multiplier, on the one hand, and the increase in the basic amount of the fine as a result of the application of that multiplier, on the other. While the Commission confirmed that it had calculated the deterrent multipliers in a manner proportionate to the turnover of the undertakings concerned, it did not assert, in the contested decision or in its written pleadings before the Court, that the application of those multipliers should result in an increase in the amount of the fine which would, in turn, be proportionate to turnover. On the contrary, it automatically follows from the figures set out by the Commission in recital 491 of the contested decision that the rate of increase of the fine resulting from the application of the deterrent multiplier is progressive in relation to the turnover of the undertakings concerned.

320 As the Commission points out, the proportionality of the deterrent multipliers can easily be ascertained by drawing a graph of the various multipliers applied in relation to the respective turnovers of the undertakings concerned. The graph which results from such an exercise is straight and therefore represents a proportionate relationship for all the undertakings concerned — except for Siemens in respect of which the relationship is degressive in so far as the multiplier applied to it was the same as that applied to Hitachi, even though its worldwide turnover in 2005 was EUR 6 billion higher than that of Hitachi. Such a proportionate relationship suffices for the requirements laid down by the Court in *Degussa v Commission*, paragraph 260 above (paragraph 338), in which it stated that the classification of undertakings by category,

for the purposes of determining the deterrent multiplier in accordance with the principle of equal treatment, must be objectively justified. It must also be recalled, in that regard, that, in accordance with the case-law cited in paragraph 316 above, the worldwide turnover of undertakings constitutes an indicator of their size and economic power.

321 Therefore, there can be no question of the Commission having inconsistently applied its own method of calculation to Siemens' detriment. Accordingly, the ground of complaint alleging that the deterrent multiplier is excessive, as a result of such inconsistent application, must be rejected.

322 For the same reason, Siemens cannot properly rely on *Tokai Carbon and Others v Commission*, paragraph 86 above (paragraphs 245 to 247), regarding the calculation of the deterrent multipliers. In those paragraphs of the judgment in that case, the Court, in essence, criticised the Commission for not having logically and consistently followed, in respect of all the undertakings concerned, the method which it had chosen for determining the deterrent multiplier. As has just been explained, such criticism cannot be made of the Commission in the present case.

323 In the third place, it must be pointed out that, while, in contrast to the deterrent multipliers, the increase to the basic amount of the fines resulting from applying those multipliers is not proportionate, but progressive, that circumstance automatically results from applying the method chosen by the Commission. The Commission thus clearly considered that such a progressive increase in relation to turnover was necessary to ensure that the fines had sufficient deterrent effect with regard to those undertakings concerned which had a particularly large turnover. The Court cannot substitute its own assessment of whether the deterrent multiplier applied was sufficient for that assessment of the Commission, all the more so in the absence of any

factual evidence showing that the system applied by the Commission led to results in excess of that required to ensure the fines had sufficient deterrent effect.

324 Accordingly, the second part of the third plea must be rejected.

C — The third part of the third plea, alleging error in the determination of the duration of the infringement

325 Siemens claims that, since the infringement is time barred in relation to the period prior to April 1999, the Commission based its increase to the basic amount of the fine on an incorrect duration. It takes the view that the Commission could not penalise it for an infringement of medium duration, which justifies, under the Guidelines, an increase of 20 % in relation to the basic amount of the fine.

326 The Commission disputes Siemens' arguments.

327 In that regard, suffice it to recall, since the plea that the action is time barred raised by Siemens, in relation to the first phase of the infringement, must be rejected (see paragraphs 236 to 255 above), this part of the third plea, also based on the plea that the action is time barred, must also be rejected.

D — The fourth part of the third plea, alleging that Siemens was wrongly classified as leader of the cartel

328 In the context of the fourth part of the third plea, based on an alleged erroneous classification of leader which was applied to it, Siemens raises three grounds of complaint, based on, first, the fact that ABB adopted the role of leader in the cartel, second, the fact that it did not adopt that role and, third, the excessive nature of the increase to the basic amount of the fine which was imposed on it on account of that role of leader in the cartel. It claims, in that regard, that the Commission breached the duty to state reasons and the principles of equal treatment and proportionality of fines.

329 It is appropriate to examine the first two grounds of complaint together before examining the third ground of complaint

1. The first and second grounds of complaint, alleging that ABB and not Siemens adopted the role of leader in the cartel

(a) Arguments of the parties

330 Siemens is of the opinion that it has shown that it did not play the role of leader in the cartel. In that regard, in the first place, it recalls that the facts for which it is criticised relating to the period from 1988 to 1999 are time barred and that, therefore, that period cannot be taken into account as an aggravating circumstance when calculating the amount of the fine. In the second place, Siemens claims that the Commission incorrectly interpreted the notion of leader and misunderstood the purely administrative nature of the secretariat services within the cartel. In the third place, according

to Siemens, the Commission did not take account of the fact that, during the period from 2002 to 2004, it did not adopt the role of secretariat.

³³¹ Siemens alleges, in addition, that the Commission misunderstood the role of instigator and leader played by ABB during the period from 1988 to 1999, which is inconsistent with its characterisation as leader during the same period. According to it, the role played by ABB as instigator of, director of and driving force behind the cartel was much more significant than the role of European secretary to the cartel adopted by it during the first phase of its participation in the cartel, as the Commission overestimated that latter role. Siemens considers that the unequal treatment can be resolved only by annulling the increase to the basic amount of the fine imposed on it.

³³² The Commission disputes Siemens' arguments.

(b) Findings of the Court

The role of leader in the cartel

³³³ In recital 514 of the contested decision, the Commission found, inter alia that Siemens was a 'leader' in the infringement, within the meaning of the third indent of Section 2 of the Guidelines, on account of the fact that it had had the role of European secretary to the cartel. The Commission considered, in recitals 514 to 522 of the

contested decision, that the basic amount of the fine to be imposed on Siemens had to increased by 50 %, which raised that amount to EUR 396 562 000.

³³⁴ Siemens' argument that the Commission wrongly classified it as leader for the second phase of its participation in the cartel, from 2002 to 2004, must be rejected as having no factual basis. While it is true that in recitals 511 to 514 of the contested decision, in which the role of leader is assessed in the context of examining aggravating circumstances, contain no details on the periods in respect of which the Commission classified Siemens and Alstom as leaders, recital 147 of the contested decision expressly states that 'the [role of European secretary] was taken over by Siemens until September 1999. Alstom acted as [European secretary] during the period from 1999-2004'. In those circumstances, it cannot be held that the Commission classified Siemens as a leader for the period from 2002 to 2004.

³³⁵ Next, as regards the allegation that the facts relating to the period from 1988 to 1999 are time barred, reference is made to the findings in paragraphs 236 to 255 above, according to which the first phase of the infringement is not time barred as regards Siemens' participation.

³³⁶ Lastly, it should be borne in mind that, according to settled case-law, where an infringement has been committed by several undertakings, it is appropriate, in setting the fines, to consider the relative gravity of the participation of each of them (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others v Commission* [1975] ECR 1663, paragraph 623; *Aalborg Portland and Others v Commission*, paragraph 48 above, paragraph 92; *Groupe Danone v Commission*, paragraph 66 above, paragraph 277, and *BASF v Commission*, paragraph 311 above, paragraph 280). So doing implies, in particular, establishing their respective roles in the infringement during the period of their participation (*Commission v Anic*

Partecipazioni, paragraph 43 above, paragraph 150; *Groupe Danone v Commission*, paragraph 66 above, paragraph 277, and *BASF v Commission*, paragraph 311 above, paragraph 280). In that regard, the non-exhaustive list of circumstances which justify increasing the basic amount of the fine, set out in Section 2 of the Guidelines, include, inter alia, in the third indent, the ‘role of leader in, or instigator of the infringement’ played by the undertaking.

³³⁷ According to the case-law, in order to be classified as a ‘leader’ in a cartel, an undertaking must have been a significant driving force for the cartel (*BASF v Commission*, paragraph 311 above, paragraph 374, and Case T-410/03 *Hoechst v Commission* [2008] ECR II-881, paragraph 423) and have borne individual and specific liability for the operation of the cartel (see, to that effect, *BASF v Commission*, paragraph 311 above, paragraph 300). That factor must be assessed in the light of the overall context of the case (see, to that effect, *BASF v Commission*, paragraph 311 above, paragraphs 299 and 373). The classification as ‘leader’ has been established when the undertaking carried out the duties of coordinator within the cartel and, in particular, organised and staffed the secretariat responsible for the actual implementation of the cartel (Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission* [2003] ECR II-2597, ‘ADM’, paragraphs 246 and 247), or when that undertaking played a central role in the actual operation of the cartel, for example by organising numerous meetings, by collecting and distributing information within the cartel, by taking responsibility to represent certain members within the cartel or most often formulating proposals relating to the operation of the cartel (see, to that effect, Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium and Others v Commission* [1983] ECR 3369, paragraphs 57 and 58, and *BASF v Commission*, paragraph 311 above, paragraphs 404, 439 and 461).

³³⁸ In the present case, as is apparent from recitals 511 to 513 of the contested decision, the Commission took into account the fact that the European secretariat to the cartel existed throughout the duration of the cartel and that it remained stable in that time, despite the numerous organisational changes within the cartel. That secretariat

had many tasks. With reference to recitals 121 to 123, 131, 132, 142, 147 to 149, 157 to 161, 173 and 185 of the contested decision, the Commission stated that the European secretariat to the cartel was the pivot for communication between the European undertakings which were members of the cartel and between them and the Japanese secretariat, it convened and chaired meetings and was responsible for accounting for the quotas. Siemens did not challenge those facts before the Court. The Commission considered that it was clear from the content of the GQ Agreement and the EQ Agreement, and from the actual functioning of the cartel, that the role of European secretary to the cartel was necessary. By taking the initiative and devoting considerable resources to the cartel, that secretary rendered a considerable service to that cartel and contributed in a special way to its proper functioning.

339 Siemens did not dispute that it assumed the duties of the European secretary to the cartel for the first phase of its participation in the cartel from 1988 to 1999 either during the administrative procedure before the Commission, or before the Court. The fact that it fulfilled that role is, in addition, apparent from the testimony of its former employees Mr E. and Mr Tr. (see, in that regard, paragraph 222 above). However, it claims that, in the present case, that European secretary could not be classified as a leader, since its role was limited to communication duties and did not imply the taking of initiative or a state of mind especially contrary to the competition rules and since it had no decision-making power.

340 In that regard, it must be held that the tasks carried out by the European secretary to the cartel conferred on it the role of ringleader in the coordination of the cartel and, on any reading, in the actual functioning of that cartel. The Commission was entitled to find, in the contested decision, that that European secretary was the point of contact between members of the cartel and that it played a crucial role in its actual

functioning inasmuch as it facilitated the exchange of information within it, and it bundled, collated and exchanged with the other members of the cartel information essential for its functioning. That concerned, in particular, information on GIS projects, as the secretary organised and staffed the job meetings secretariat.

³⁴¹ That crucial role is not undermined by the existence of the European committee group, which also played an important role in the cartel. In addition, it is undisputed that Siemens was also a permanent member of that committee. Therefore, its duties as European secretary to the cartel were in addition to its role as permanent member of the committee and distinguish it from other permanent members of the committee, that is to say, ABB and Alstom.

³⁴² Furthermore, the Commission was entitled to find, in recitals 147 and 513 of the contested decision, that holding the secretariat to the cartel was a significant responsibility implying substantial resources, be that in terms of time or staff made available. Without the central coordination and organisation ensured by the European secretary to the cartel, that cartel would undoubtedly not have been able, in the light of its complexity, to function as effectively. In addition, taking account of the fact that it is undisputed that Siemens carried out those tasks in a stable manner, from the beginning of the cartel in 1988 until the interruption in its participation in 1999, the Commission was entitled to find that that undertaking was, in the present case, a driving force behind the cartel and, as a result had the 'role of leader in the infringement', within the meaning of the third indent of Section 2 of the Guidelines.

³⁴³ Siemens' arguments relating to ABB's role of leader are not such as to cast doubt on that finding.

344 As regards, first, Siemens' argument that ABB's role of leader was inconsistent with the classification of it as leader, the Court must reject the premiss underlying that argument, according to which the role of leader in a cartel can be carried out only by one undertaking at a time.

345 As is apparent from the case-law, it is entirely possible that two or more undertakings be attributed the role of leader, in particular in the context of a cartel implicating a high number of participants, like the cartel in GIS projects was, at least in the first phase of its operation (see, to that effect, *BASF v Commission*, paragraph 311 above, paragraphs 439 and 440; Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré and Others v Commission* [2007] ECR II-947, paragraph 561, and the case-law cited).

346 Therefore, even if ABB should be classified as a leader of the cartel in GIS projects, that does not mean that Siemens cannot also be classified as leader.

The alleged unequal treatment of Siemens with regard to ABB

347 Next, it is necessary to examine Siemens' argument that, by attributing the role of leader to it and by not attributing that role to ABB, the Commission breached the principle of equal treatment, since ABB played the role of instigator and leader. That argument must be rejected for two reasons.

348 On the one hand, as regards ABB's alleged role as instigator, it must be borne in mind that, as is clear from the wording of the third indent of Section 2 of the Guidelines, it is necessary to distinguish between the concept of leader in and that of instigator of an infringement. Whereas instigation is concerned with the establishment or enlargement of a cartel, leadership is concerned with its operation (*BASF v Commission*, paragraph 311 above, paragraph 316). Therefore, the leader in the infringement and the instigator of that infringement are not in comparable situations, with the result that, even if the Commission, wrongly, did not classify ABB as instigator of the cartel, the fact that that company was treated differently than Siemens does not constitute a breach of the principle of equal treatment.

349 On the other hand, it has neither been established nor even alleged that ABB assumed the duties of European secretary to the cartel or even that it carried out alone, in a stable manner and over a long period, the duties normally conferred on that European secretary. Moreover, while it is generally acknowledged, even by the Commission, that ABB played a 'significant role' in the cartel, it has not been shown that that role was comparable, from the point of view of the functioning of the cartel, to that played by Siemens and Alstom or Areva as European secretaries to the cartel.

350 Siemens' allegations in that respect are not such as to call that finding into question.

351 First, Siemens' reference to the role played by ABB in the pre-insulated pipe cartel at the end of the eighties is out of place in the present case, aside from the fact, correctly found in the contested decision, that ABB has to be classified as a repeat offender in relation to cartels.

352 Second, the evidence in the case-file relied on by Siemens is not such as to substantiate its argument that ABB should be classified as leader of the cartel.

353 Contrary to what Siemens claims, the fact that, within ABB, the decision to participate in the cartel may have been taken at the highest level, even if established, in no way confirms that ABB was a driving force in the cartel. The same goes for the fact that two of ABB's employees were, according to the information from Mr M., successively 'European speaker'. That fact does not confer on that undertaking a leading position in the cartel. In that regard, it must be stated that the nature of the task of 'European speaker' is not apparent from the evidence on the case-file or, in particular, from Siemens' written pleadings. Further, the fact that neither the GQ Agreement nor the EQ Agreement refer to that role allows it to be assumed that the duties of 'European speaker' were not hugely significant in the functioning of the cartel.

354 Similarly, while it is true that footnote 153 of the contested decision refers, as Siemens points out, to a statement from Areva that ABB chaired the management-level meetings, the insertion of that footnote in recital 147 of the contested decision and the wording of Areva's statement make it apparent that that statement relates only to the period from 2002 to 2004. The Commission does not allege that Siemens held the secretariat during that relatively short period; it was Alstom or Areva which carried out that role during that period. Siemens in no way explains how the fact, if assumed proved, that ABB may have chaired management-level meetings for barely two years, during a period in which the secretariat was held by Alstom or Areva, makes ABB's role comparable to Siemens role for the period of over 11 years during which it held the post of European secretary to the cartel.

355 The fact, as stated by Siemens, that ABB and Alstom had decided, in 2000, to exclude the VA Tech undertaking from the cartel, by way of a 'goodbye party', does not establish a leading role for ABB. Given that, following the merger which took place on the relevant market, there were only three European undertakings in the cartel after Siemens interrupted its participation, one cannot speak of a role of leader, when two of those undertakings gang up on against the third.

356 Lastly, Siemens' allegation that ABB played a decisive role in the organisation and implementation of retaliatory measures against Siemens after its departure is not substantiated by any evidence. Neither recital 169 of the contested decision, nor Mr M's statement, which is cited in that recital, contain the slightest indication that ABB played a decisive role in the organisation or implementation of those retaliatory measures.

357 Therefore, Siemens has not established that ABB was in a situation comparable to its own, as regards the classification as leader, with the result that the different treatment applied to those undertakings is justified.

358 In any event, even if the Commission mistakenly did not classify ABB as leader of the cartel, despite the significant role which ABB played in the cartel, such an unlawful act, in favour of a third party, would not justify upholding the plea for annulment raised by Siemens. According to settled case-law, respect for the principle of equal treatment or non-discrimination must be reconciled with the principle of legality, according to which a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party (see, to that effect, Case 188/83 *Witte v Parliament* [1984] ECR 3465, paragraph 15; *SCA Holding v Commission*,

paragraph 184 above, paragraph 160; Case T-347/94 *Mayr-Melnhof v Commission* [1998] ECR II-1751, paragraph 334, and *LR AF 1998 v Commission*, paragraph 87 above, paragraph 367).

359 As was explained in paragraphs 339 to 342 above, the Commission was correct to find that Siemens had a leading role in the cartel. Therefore, since Siemens argument is that its fine should not be unlawfully increased, it cannot be upheld (see, to that effect, *Mayr-Melnhof v Commission*, paragraph 358 above, paragraph 334, and *SCA Holding v Commission*, paragraph 184 above, paragraph 160).

360 Accordingly, Siemens' grounds of complaint alleging that it did not play the role of leader in the cartel, and that ABB should be classified as instigator or leader of the cartel, must be rejected.

2. The third ground of complaint, alleging that the increase in the basic amount of the fine imposed on Siemens on account of its role of leader in the cartel was excessive

(a) Arguments of the parties

361 Siemens claims, in the alternative, that, even if the temporary carrying out of the duties of secretariat were to justify it being classified as a leader, the increase of 50 % applied by the Commission is excessive and constitutes a breach of the principles of

equal treatment and proportionality. Relying on the Commission's decision-making practice, Siemens claims that an increase of 50 % to the basic amount of the fine presupposes the existence of other aggravating circumstances on top of the mere fact that the undertaking in question, carried out the duties of secretariat. It concludes that the Court should substantially reduce the increase which was applied to it, in the context of the Court's powers of unlimited jurisdiction.

³⁶² The Commission disputes Siemens' arguments.

(b) Findings of the Court

³⁶³ First, it must be stated that the argument that an increase of 50 % is higher than that generally applied in other Commission decisions is not capable of proving an infringement of the principle of proportionality (*Bolloré and Others v Commission*, paragraph 345 above, paragraph 579; see also, to that effect, *ADM*, paragraph 337 above, paragraph 248).

³⁶⁴ In this respect, it is sufficient to recall that, according to settled case-law, when determining the amount of each fine, the Commission has a discretion and is not required to apply any particular arithmetical formula (Case T-150/89 *Martinelli v Commission* [1995] ECR II-1165, paragraph 59; Case T-352/94 *Mo och Domsjö v Commission* [1998] ECR II-1989, paragraph 268, and *Bolloré and Others v Commission*, paragraph 345 above, paragraph 580). Therefore, Siemens cannot derive an argument

from the increases applied by the Commission in other cases in order to found a ground of complaint alleging breach of the principle of proportionality.

³⁶⁵ Second, in relation to Siemens' argument that the increase of 50 % in the fine on account of its role of leader in the cartel also breaches the principle of equal treatment, in so far as ABB was a driving force in the cartel, it must be recalled that, as has been stated in paragraphs 352 to 357 above, Siemens has not succeeded in showing that, on the basis of the evidence on the case-file, ABB's role should be classified as the same as its own. In particular, the alleged driving force which ABB represented in the cartel has not been supported by any evidence. Therefore, as ABB and Siemens were not in the same position, the Commission was not required to treat them the same way.

³⁶⁶ In addition, even assuming, as Siemens alleges, that the driving force in the cartel by ABB required the role of that undertaking to be classified as equivalent to that of Siemens and the Commission wrongly failed to do so, such an unlawful act in favour of a third party would not justify upholding the plea for annulment raised by Siemens. As has been recalled in paragraph 358 above, the principle of equal treatment or non-discrimination must be reconciled with the principle of legality, according to which a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party.

³⁶⁷ Third, as regards whether the increase in respect of Siemens' leading role was proportionate, it is apparent from the case-law that the fact that an undertaking acted as ringleader of a cartel means that it must bear special responsibility in relation to the other undertakings (see, to that effect, *IAZ International Belgium and Others v Commission*, paragraph 337 above, paragraphs 57 and 58; Case C-298/98 P *Finnboard*

v *Commission* [2000] ECR I-10157, paragraph 45, and *Mayr-Melnhof v Commission*, paragraph 358 above, paragraph 291).

368 In the present case, in the light of the importance of the duties assumed by Siemens within the cartel, in its role as European secretary to the cartel as described in paragraphs 338, 340 and 342 above, an increase of 50% cannot be described as disproportionate.

369 Therefore, the third ground of complaint must be rejected as must accordingly, the fourth part of the third plea.

E — The fifth part of the third plea, alleging manifest error of assessment as regards the failure to reduce the amount of the fine pursuant to the Leniency Notice

1. Arguments of the parties

370 Siemens claims that the Commission was wrong not to grant it a reduction in the amount of the fine pursuant to the Leniency Notice. It claims that it adduced evidence of significant added value and, in that respect, refers to the communication of a series of cartel meetings, a reconstructed file, a lawyer's letter on the functioning of the

cartel between 2002 and 2004, the result of Siemens' internal inspection in 2005 and the testimony of its former employees Mr Tr., Mr E. and Mr Sch.

371 The Commission disputes Siemens' arguments.

2. Findings of the Court

372 In accordance with Point 21 of the Leniency Notice, in order to qualify for a reduction in the fine pursuant to that notice, an undertaking must provide the Commission with evidence of the suspected infringement which represents significant added value with respect to the evidence already in the Commission's possession.

373 Under Point 22 of the Leniency Notice, the concept of 'added value' refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission's ability to prove the facts in question.

374 According to the case-law, the reduction in the amount of fines in the event of co-operation from undertakings which have participated in infringements of Community competition law is based on the consideration that such cooperation facilitates the Commission's task of establishing an infringement and, where relevant, of bringing it to an end (*Dansk Røhrindustri and Others v Commission*, paragraph 285 above, paragraph 399; Case T-311/94 *BPB de Eendracht v Commission* [1998] ECR II-1129,

paragraph 325; Case T-338/94 *Finnboard v Commission* [1998] ECR II-1617, paragraph 363, and *Mayr-Melnhof v Commission*, paragraph 358 above, paragraph 330).

³⁷⁵ As mentioned in Point 29 of the Leniency Notice, that notice has created legitimate expectations on which undertakings may rely when disclosing the existence of a cartel to the Commission. In view of the legitimate expectation which undertakings intending to cooperate with the Commission are able to derive from the notice, the Commission must therefore adhere to the notice when, for the purpose of determining the fine to be imposed on Siemens, it assesses Siemens' cooperation (see, by analogy, Case T-26/02 *Daiichi Pharmaceutical v Commission* [2006] ECR II-713, paragraph 147, and the case-law cited).

³⁷⁶ Within the limits laid down by the Leniency Notice, the Commission has however a wide discretion in assessing whether or not the evidence provided by an undertaking brings added value within the meaning of Point 22 of the Leniency Notice and whether a reduction should be granted to that undertaking under that notice (see, by analogy, *Dansk Røhrindustri and Others v Commission*, paragraph 285 above, paragraphs 393 and 394, and Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others v Commission* [2006] ECR II-5169, paragraph 532). That assessment is subject to a limited judicial supervision.

³⁷⁷ In the present case, it must thus be ascertained whether the Commission committed a manifest error of assessment, by taking the view that Siemens' statements, referred to in recitals 533 to 536 of the contested decision, did not bring significant added value.

378 In relation to those statements, it must be observed, as a preliminary point, that the information provided by Siemens between 28 May 2004, which was the date of its application pursuant to the Leniency Notice, and the statement of objections of the end of April 2006 concerned only the second phase of its participation in the cartel, that is to say, the period from 2002 to 2004. By contrast, it remained silent in relation to its participation in the cartel between 1988 and 1999, until the statement of objections.

379 In addition, it must be pointed out that, in all its communications pursuant to its cooperation with the Commission, Siemens always disputed that the agreements in which it had participated concerned GIS projects within the EEA or had effects within the EEA. Rather than a spirit of sincere cooperation, those communications thus make it seem as if there was an attempt to conceal, in so far as possible, the true content of the agreements, as proved by the Commission in the contested decision.

380 However, the condition of cooperation laid down in Point 11 of the Leniency Notice applies only to applications for immunity from fines and not to applications for leniency, as is apparent from Point 20 of that notice. Therefore, the clear lack of sincerity in Siemens' statements does not prevent it being granted a reduction in the fine to the extent that, in accordance with Point 21 of that notice, it provided evidence with significant added value.

381 As regards the alleged added value of the information provided by Siemens, first, it asserts that, in its letter of 28 May 2004, it described 'a whole series of cartel meetings in more detail.'

382 In that regard, it must be stated that, in its application pursuant to the Leniency Notice of 28 May 2004, Siemens acknowledged that its employees, Mr R., Mr S. and

Mr Ze., had had, from the beginning of 2002, contacts with ABB, Alstom or Areva and the VA Tech Group and it produced a first list of management-level meetings and operational-level meetings. However, it stated that the purpose of those contacts was ‘benchmarking’ — that is to say, the exchange of best practice for the purposes of increasing the competitiveness of undertakings in the sector — and to discuss the possibility of cooperating in relation to common supply or exchange of preliminary products. Furthermore, Siemens also accepted that a very limited number of actual projects had been discussed at those meetings. None the less, it indicated that they were only international projects with no link whatsoever with the EEA. Further, those projects were not the subject of agreement on price; rather a call was made for ‘reasonable’ conduct from the producers in relation to the level of their bids.

383 Those details cannot be described as ‘evidence of the alleged infringement’, within the meaning of Point 21 of the Leniency Notice, since they refer only to entirely inoffensive contacts between the European GIS producers. Furthermore, as the Commission stated in recital 534 of the contested decision, without being challenged by Siemens, it was already aware of those meetings and their participants.

384 Second, Siemens claims that it decoded data and submitted it to the Commission.

385 In that regard, with its letter of 23 July 2004, Siemens produced various documents. In the first place, it produced a list of GIS projects for which offers were to be submitted in 2002 and 2003, located exclusively outside the EEA, with indications of the producers to which they had been allocated. That list was reconstructed from a file seized during the Commission’s inspections at its premises. In the second place, it produced a list of communications which had been made, between 22 April and 22 May 2004,

from the SIM card of its employee, Mr Ze. In the third place, it produced numerous documents discovered on Mr Ze's laptop and referring to the possibilities for bilateral cooperation envisaged with other GIS producers.

386 As regards the list of projects, it contains no GIS project in Europe and is therefore not capable of providing details on the effects of the cartel within the EEA. In relation to the list of telephone communications, it contains only the date, the time and duration of outgoing calls and the number called. Moreover, Siemens has not indicated in what way that list could have assisted the Commission in establishing the existence of a cartel, all the more so since it concerns a period (between April and May 2004) during which, according to Siemens, the cartel had already ceased to exist. Lastly, the documents from Mr Ze's laptop refer only to projects for inoffensive cooperation, and having no link with the cartel at issue, such as benchmarking activities and the possible creation of consortiums for certain projects.

387 Therefore, none of the documents can be described as evidence supporting the Commission's capacity to establish the existence of the cartel.

388 Third, Siemens claims that it sent a document drawn up in the name of its former employees who participated in the cartel, which described 'in a detailed manner, how the cartel functioned' and listed 'in minute detail the agreements on various [GIS] projects in the EEA.' According to Siemens, that document constitutes a 'specific document relating to the agreements concluded between 2002 and 2004.'

389 In that regard, it must be observed that, on 7 December 2004, Siemens actually sent to the Commission a document dated 25 November 2004, drawn up by the legal advisers

of unidentified former Siemens' employees. Siemens presumes that they are Mr R., Mr S and/or Mr Z., who, according to the Commission, represented Siemens during the second phase of its participation in the cartel. In that document, the statements of those employees are summarised and, *inter alia*, it is indicated that, during the meetings which took place from October 2002, with ABB, Alstom and the VA Tech Group, GIS projects in the common market had been discussed with a view to coordinating conduct, concluding agreements and fixing prices, that Alstom was charged with the secretariat duties and that communication was made by telephone, facsimile and coded emails. In the letter which it forwarded on 7 December 2004, Siemens stated that in the light of the content of that document, its earlier statements were possibly incomplete or even wrong. It also stated, contrary to what it claims before the Court, that 'the information forwarded [was] not very detailed.'

³⁹⁰ While those details have some probative value with regard to the infringement — the Commission cited the document of 25 November 2004 in footnote 153 of the contested decision as confirming the fact that Alstom or Areva had held the European secretariat following the departure of Siemens in 1999 — they only confirm the evidence which the Commission already held. Areva had itself acknowledged, in a document sent to the Commission by facsimile on 25 May 2004, that it had held the secretariat. Therefore, the information submitted by Siemens cannot be described as bringing significant added value with respect to the evidence already in the Commission's possession.

³⁹¹ Fourth, Siemens claims that it analysed the competition situation on the principal European Union markets and submitted its conclusions to the Commission and that no other undertaking had provided such detailed information on the background to the market and competition.

392 In that regard, it must be observed that, on 4 July 2005, Siemens sent a written summary of an internal inspection to the Commission. It stated that, in the course of that inspection, it had undertaken, *inter alia*, a review of all the GIS projects which it carried out in Europe between January 2000 and April 2004, from the perspective of complying with the legal provisions relating to cartels. According to it, despite its considerable efforts, that inspection had not led to concrete results which would be capable of confirming the objections set out by the Commission, and did not allow findings of irregularities which would have led to the conclusion that there were agreements between competitors in relation to specific projects within the European Union.

393 Therefore, it is not possible to attach probative value to the information forwarded by Siemens on 4 July 2005. In particular, it does not appear that the alleged ‘detailed information on the background to the market and competition’ supported the Commission’s capacity to establish the infringement found in the contested decision and therefore have significant added value.

394 Fifth, Siemens claims that it forwarded testimony from its former employees, Mr Tr., Mr E. and Mr Sch., to the Commission, which contained detailed information on the conclusion of the GQ Agreement and the role played by ABB within the cartel.

395 In that regard, it must be pointed out that, annexed to a letter of 7 August 2006, Siemens sent to the Commission the record of testimony from its former employees, Mr Tr., Mr E. and Mr Sch. In that letter, Siemens’ legal representative summarised the content of that testimony. It was, *inter alia*, indicated that it was BBC, later ABB, which took the initiative for the GQ Agreement and which was the driving force behind preliminary discussions among European producers, that the GQ Agreement covered Middle Eastern markets and did not concern European projects, that Siemens distanced itself from the GQ Agreement at the end of 1998 or, at the latest, at the start of 1999, and that the cartel in which Siemens had participated between 2002 and 2004 had no link with the earlier cartel based on the GQ Agreement.

396 It must also be observed that that information was sent more than three months after the statement of objections sent at the end of April 2006, in which the Commission had already set out evidence relating to the alleged infringement of GIS producers. Furthermore, the only new element which arises from those testimonies is the confirmation that ABB was the instigator and the driving force behind the conclusion of the GQ Agreement. As has been stated in paragraphs 350 to 357 above, that assertion is not supported by other evidence on the case-file. Therefore, the testimony of Mr Tr., Mr E. and Mr Sch. cannot be classified as evidence which supported the Commission's capacity to establish the infringement found in the contested decision and which brought significant added value.

397 It follows from the foregoing that the Commission did not infringe the Leniency Notice by refusing to grant Siemens a reduction in the fine imposed on it. Accordingly, the fifth part of the third plea must be rejected.

F — The sixth part of the third plea, alleging that DG 'Competition' in fact constrained the College of Commissioners

1. Arguments of the parties

398 Siemens criticises the fact that the evening before the College of Commissioners' decision on the present matter certain media outlets stated that a huge fine would be imposed on undertakings which had participated in the alleged cartel, indicating precisely the amount of the fines imposed on the various undertakings concerned. It considers that such conduct constitutes a breach of the fundamental principle of Community law under which the College of Commissioners adopts its decisions of its own authority and independently.

399 The Commission expresses regret regarding the incident referred to by Siemens. It points out, however, that the publication of the figures was not deliberate or even something of which it was aware. It carried out, without success, an internal review of that matter in order to detect the leak and, subsequently, amend its decision-making practice, so as to avoid such an incident occurring again. As regards the legal assessment on that point, the Commission considers that premature publication of that kind is not such as to restrict the Commissioners' independence and that that incident does not undermine the lawfulness of the contested decision.

2. Findings of the Court

400 It should be recalled that Article 287 EC obliges the members, officials and agents of the institutions of the Community 'not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their costs components.' While that provision refers especially to information gathered on undertakings, the words 'in particular' show that it is a general principle which also applies to other confidential information (Case 145/83 *Adams v Commission* [1985] ECR 3539, paragraph 34; see also, to that effect, Case T-353/94 *Postbank v Commission* [1996] ECR II-921, paragraph 86).

401 In the present case, it is apparent from the case-file that, before adopting the contested decision, essential components of the draft decision submitted to the College of Commissioners for definitive approval were leaked to a press agency. On 23 January 2007, the evening before the contested decision was adopted, around 19.00 hrs, that agency published precise details regarding the total amount of the fines and the individual amounts of the fines on Siemens, Melco and Alstom, as well as details that ABB had benefited from immunity from fines as the Commission's informant. The

Commission, while confirming that it had been unable to detect the author of that leak to the press, did not dispute that the leak occurred within its services.

402 It is settled case-law that an irregularity of the type found above may lead to annulment of the decision in question if it is established that the content of that decision would have differed if that irregularity had not occurred (*Suiker Unie and Others v Commission*, paragraph 336 above, paragraph 91; *Dunlop Slazenger v Commission*, paragraph 174 above, paragraph 29). However, in the present case the applicant has not adduced such evidence. There are no grounds for supposing that if the information at issue had not been disclosed, the College of Commissioners would have altered the proposed amount of the fine or the content of the draft decision. In particular, there is no evidence indicating that the College of Commissioners as a whole or certain Commissioners felt bound or took the view that they could not depart from those aspects of the draft decision which were leaked to the press.

403 Accordingly, the sixth part of the third plea must also be rejected. The third plea must therefore be rejected in its entirety.

404 As the three pleas raised by Siemens have been rejected, the application must be dismissed.

Costs

405 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Siemens has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. Dismisses the application;

2. Orders Siemens to pay the costs.

Pelikánová

Jürimäe

Soldevila Fragoso

Delivered in open court in Luxembourg on 3 March 2011

[Signatures]

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